

**U.S. Department of Labor**

Board of Contract Appeals  
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**Issue Date: 15 December 2003**

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In the Matter of :

R.F. LUSA & SONS :  
SHEETMETAL, INC. :

Appellant :

Case No. 2000-BCA-00002

For Appellant: Leonard W. Childs, Esq.  
Savannah, Georgia

For Contracting Officer: Stephen R. Jones, Esq.  
Office of Solicitor,  
U.S. Department of Labor

Before: Levin, Miller, and Vittone  
Levin, Administrative Judge:

**Decision and Order**

This matter is before the Board on appeal by R.F. Lusa & Sons Sheetmetal, Inc. (hereinafter; Lusa & Sons, Contractor, or Appellant) from a Contracting Officer's final decision to issue a default termination on a job calling for the removal and replacement of the roofs on two buildings at the Ramey Job Corps Center (RJCC) in Aquadilla, Puerto Rico. The roofing project gave rise to Contract Number E-7590-9-00-82-20 requiring, *inter alia*, the removal of a quantity of asbestos containing material (ACM) identified as present in the roof felt of one building and the roof flashing of the other. Having concluded that Appellant was handling and disposing of ACM without required permits and approvals as required by the contract and was unable to complete the project in a timely and responsible manner, the Contracting Officer on February 7, 2000, issued a termination for default notice. Lusa & Sons sought reconsideration and the Contracting Officer

denied it on March 10, 2000. This appeal followed. Appellant seeks the conversion of the termination for default into a termination for convenience and costs.

The Board has considered the entire record, including the testimony adduced at the hearing, documents in evidence, and the arguments of the parties, and enters the following findings and conclusions:

### **Findings of Fact**

1. Lusa & Sons is a Florida Corporation which specializes in roofing and sheet metal work, operating from its principal offices in Lakeland, Florida. Its business extends throughout the State of Florida and into Georgia and Tennessee. Tr. 616. Generating three to five million dollars per year in business, it was authorized to bid on the contract as a small business concern. Tr. 614-15.

2. Robert F. Lusa (Lusa) and Joseph Lusa are operating officers of the business. Tr. 614. Bruce Lusa was Appellant's on-site superintendent at RJCC. At times here relevant, Appellant secured the services of Jose Acevedo as a local consultant to advise it in dealing with asbestos management requirements in Puerto Rico.

3. The Job Training Partnership Act (JTPA) (29 U.S.C. § 1501 et seq.) authorized the Department of Labor (DOL) to provide employment and training opportunities for eligible individuals. Under JTPA Title IV, Part B, DOL's Employment and Training Administration (ETA) funded the Job Corps program for disadvantaged youth. The JTPA was superseded by the Workforce Investment Act (WIA) (29 U.S.C. § 2911 et seq.) on June 30, 2000.

4. A major component of the Job Corps program is the operation of residential centers where enrollees participate in intensive programs of education, vocational training, work experience, counseling and related activities. JTPA § 421; 29 U.S.C. § 1691. There are more than 120 Job Corps centers located across the country. ETA Contracting Officers enter into contracts for the construction, maintenance and repair of the buildings used by those centers. Tr 49.

5. On December 12, 1998, ETA issued an Invitation for Bids (IFB) for a

contract to remove and replace the roofs on two structures (Buildings 702 and 759A) at the RJCC in Aquadilla, Puerto Rico. Administrative File (AF Vol.5, Tab 133 at 2496. The IFB, *inter alia*, called for the removal of 20,450 square feet of roof felt ACM from Building 702 and 1,000 square feet of roof flashing ACM from Building 759A. AF Vol. 5, Tab 125 at 2344 and Tab 133 at 2496 and 2497A.<sup>1</sup>

6. John M. Steenbergen was the Supervisory Contracting Officer for this project. AF at 2343. Two other Contracting Officers, Brenda Williams and Monica Gloster, were, from time to time, authorized to sign documents concerning the RJCC project. Tr. 145-46. Steenbergen retired in January, 2002.

7. Pamela Donegan is an Architect and Assistant Director for Design and Construction West Region Dewberry Design Group of the P.B. Dewberry Joint Venture, DOL's Engineering support contractor. Tr. 43. On the RJCC Project she was Project Manager for Design Construction East Region. Tr. 43. She managed the roof replacement. Tr. 45.

8. Beato & Associates (Beato), as the Project Architects/Engineers, prepared the technical specifications for the project. AF at 2458A. Juan D'Narvarte, a Beato engineer, was the Architect/Engineer (A/E) on the project and was assigned the responsibility for ensuring compliance with the specifications. Tr. 164-65.

9. The A/E retained the services of Angel Menendez, an asbestos abatement consultant, who prepared the asbestos abatement specifications. Tr. 168; Tr. 178; and Tr. 180. Menendez has been an asbestos contractor since 1992, has worked as a building inspector, project designer, and has provided abatement services in Puerto Rico to the Navy, Air Force, Coast Guard, FBI, and GSA. Tr. 260-61. He has experience in ACM abatement on roof replacement projects and acted as the owner's representative for the purpose of determining compliance with the asbestos specifications. Tr. 300.

10. Menendez prepared the technical specifications of the contract governing the asbestos abatement, (Sections 1013, 1043, 1091, 1092, 1301, 1503, 1562, 1601, 1701, 1714, 2086), Tr. 266; Tr. 322-23, reviewed the asbestos-related submittals, and conducted site inspections. Tr. 264; Tr. 260; Tr. 179; Tr. 316.

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<sup>1</sup> Page references with an "A" refer to the back of the numbered page in the original Appeal File. See, Tr. 121.

Menendez had no involvement in preparing the non-asbestos specifications, and did not review them, Tr. 315; Tr. 319, and D’Narvarte acknowledged that he did not review the asbestos-related specifications prepared by Menendez. Tr. 180; Tr. 238; Tr. 245.

11. Brian Dushayne is a licensed asbestos consultant and a principal engineer at Law Engineering Company. Tr. 389. He has served as a project designer, worked on job corps projects, and consulted on asbestos-related abatement work for government and private industry. Tr. 390-91. He testified that the asbestos specifications prepared by Menendez were based on guide specifications published by the National Institute of Building Science, NIBS. Tr. 432-33. Dushayne did not visit the RJCC work site. Tr. 417.

12. Prior to drafting the asbestos specifications, Menendez took bulk samples from the roof on building 702 to confirm the presence of previously identified ACM. Tr. 316-17. He also sampled the flashing. Tr. 317. While sampling, Menendez measured the area covered by ACM on both buildings. Tr. 318.

13. On January 8, 1999, the A/E issued Amendment No. 1, which changed the dates for the pre-bid walk through and the bid opening. The pre-bid walk-through was conducted on February 3, 1999. AF Vol. 5 at 2349. No representative of Lusa & Sons attended the walk-through. *Id.*; Tr. 794, 802, 804; AF Vol. 5, Tab 131 at 2382.

14. On January 25, 1999, the A/E issued Amendment No. 2 which added a drawing to the bid set. AF Vol. I, Tab 130. The Drawing ED-1, AF Vol. 5, Tab 130, at 2378), describes the roof edge on Building 759A, the Cafeteria.

15. On February 12, 1999, the A/E issued Amendment No. 3, which revised the contract length (to 194 days), the period between Notice to Proceed and Substantial Completion (154 days), the bid set drawing details, and the bid set specifications. AF Vol. 5, Tab 128.<sup>2</sup> One of the Specification revisions, Number 21, revised Section 01013 by, among other things, noting 1,000 square feet of ACM in

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<sup>2</sup> Amendment Three also deleted Items 1 and 2 of Section 01310, and Sections 01632, 02070; 07532; and 07552, and deleted portions of Sections 01700; 03520; and 03520-5, AF Vol. 5 at 2345-47, and Number 37 replaced Sections 02081 and 02084 with Section 02086 (AF Volume 5 at 2346 and 2530). *See also*, Tr. 213-218; AF Vol. 5, Tab 125, at 2342-2372).

roof flashing on Building 759A, increasing the identified area of ACM on Building 702 from 20,450 sq. ft. to 30,000 sq.ft., and emphasizing that the contractor would be responsible for properly removing and disposing of all identified ACM. AF Vol. 5, at 2344.

16. Contracting Officer Williams, on June 22, 1999 awarded a contract to Lusa in the amount of \$658,000.00. The scope of the contract involved the total replacement of the existing roofs on two buildings at the RJCC. The first structure, the Recreation Building, was identified as Building 702; the second structure, the Cafeteria Building, was identified as Building 759A. (AF Vol. 5, Tab 133, at 2458).

17. Contract specifications disclosed that ACM existed in portions of the two buildings and that a part of the contract base work included the removal and disposal of ACM. Specifically, contract specification Section 01013 noted approximately 30,000 sq. ft. of ACM in the roofing felt at Building 702 -- the Recreation Building; and, 1,000 sq. ft. of ACM in the flashing on Building 759A -- the Cafeteria Building. (AF Vol.5, at 2330-1; Tab 125, pg. 2344). It specifically provided;

Roof flashing at Building 759A is to be removed [in] its entirety. Roof flashing thickness is approximately 6 (six) inches.

There are approximately 30,000 square feet of asbestos containing material and mastic located at the roof level of the facility, at Building 702. Contractor is responsible for the removal of the entirety of the asbestos containing roofing material and mastic. (AF Vol. 5, Tab 125, at 2344).

18. The contract called for substantial completion of the work within 154 days following receipt of the Notice to Proceed, (AF Vol. 5, Tab 122, at 2330-31), which issued on July 12, 1999. AF Vol. 5, Tab 123 at 2332. The Substantial Completion date for the project was December 13, 1999; the Final Completion date was January 24, 2000. AF Vol. 5, at 2322; AF Vol. 6, at 2676.

**Federal Regulations Applicable to  
Asbestos Abatement Activities.**

19. Friable ACM is identified by the Environmental Protection Agency (EPA) as any material containing a percent or more of asbestos that can be pulverized using hand pressure. Under the National Emissions Standard for Hazardous Air Pollutants, (NESHAP) Appendix A, Subpart (m), EPA requires the identification of ACM before demolition of roofing material, distinguishes non-friable from the friable, and includes three categories, pliable, brittle, and regulated asbestos containing material (RACM), which is then differentiated into four subcategories. Tr. 407. All friable materials are RACM. Tr. 408. One category is non-friable material which has become friable through, for example, degradation. Another category is non-friable material such as roofing materials that has been subjected to sanding, grinding, abrading, and certain types of cutting with blunt edge cutting machines. Tr. 408. When roofing demolition does not involve one of those processes, it remains category one non-friable and is not RACM. Tr. 409.

20. Under NESHAP procedures to control the release of asbestos into the air and to regulate the removal, demolition, and disposal of asbestos-containing material, 40 CFR § 61.145, *et.seq.* (July 1, 1995), the owner of a facility must file an air emissions permit application whenever the amount of “friable” asbestos materials in a facility being demolished, or the asbestos being removed, contains more than one percent (1%) of asbestos per weight. The amount of asbestos in the roofing materials at Buildings 702 was 35 percent, and in the flashing on building 759A, it was 7 percent. The record shows, however, that this ACM was non-friable.

21. Appellant’s expert, Dushayne, explained that the material is category one non-friable if it has remained non-friable and has not been exposed to one of those four trigger activities. There is no requirement under the NESHAP to containerize category one non-friable material or to provide for any special disposal of such waste. Tr. 412.

22. OSHA regulations applicable to this abatement project are set forth at 29 C.F.R. §1926.1101. Tr. 367; Tr. 394. Subsection (g)(11), which relates to flashings, requires that the material be handled by a competent person, in this instance, Lusa’s on-site superintendent, Bruce Lusa, Tr. 397-98, but it does not require separate sealed containers for intact roofing material. Tr. 398; Tr. 404. OSHA also permits the manual removal of ACM in the binder of roofing material without such precautions as work suits and decontamination facilities. Tr. 398-404. Under the OSHA standards for roofing waste, intact material requires no wrapping.

Tr. 413-14.

### **Asbestos Regulations In Puerto Rico**

23. Commonwealth of Puerto Rico, Act No. 9, of June 18, 1970 establishes an environmental public policy for the Commonwealth and created the Environmental Quality Board (EQB). (*See*, Title II of the Puerto Rico Environmental Public Policy Act (Law No. 9 of June 18, 1970, as amended). The EQB was empowered, *inter alia*, to adopt rules and regulations to establish a system of permits and licenses designed to administer the Federal Clean Water Act, the Federal Clean Air Act, and other Acts, and establish local standards that regulate the pollution controls for air, water, solid waste, and noise. EQB implemented its authority by promulgating Regulations for the Control of Atmospheric Pollution. As a general rule, regulation of Atmospheric Pollution is implemented through a permit program.

24. Asbestos is currently regulated by the EQB as an air pollutant under the EQB Regulations for the Control of Atmospheric Pollution and is, therefore, subject to the air emission permit requirements. The air regulations govern the removal, demolition, enclosure, encapsulation, and repair of asbestos-containing materials. Air Regulation, Part IV -- Rule 422. Rule 422 is consistent with NESHAP asbestos standards. *See*, 40 CFR § 61.40 (July 1, 1995).

25. Contract Section 02086, Paragraph 1.3.7, referenced the EQB regulations for Control of Atmospheric Pollution and for Non-Hazardous Solid Waste Management. AF Vol. 5, at 2530A. Among the regulations dealing with air pollution, Rule 422, Asbestos Containing Material Management, Paragraph (A) provides: “No person shall cause or permit the management of asbestos-containing material as defined in these regulation[s] without obtaining an operational permit approval from the [EQB]....”

26. Dushayne and Menendez differed in their interpretations of Rule 422. In Dushayne’s opinion, the definition of asbestos containing material under EQB Rule 422, as a measure implementing NESHAP, should be construed as adopting the NESHAP trigger quantity of one percent regulated ACM (RACM) which does not include category one non-friable ACM. Tr. 414-15. Dushayne explained that when

roofing demolition does not involve sanding, grinding, abrading, or blunt edge cutting by machine, it remains category 1 non-friable under NESHAP and, in his opinion, Puerto Rico did not require permitting for the demolition portion of contract work because it did not generate trigger quantities of RACM. As a consequence, he contended, that this was not a permitted job because there was not a sufficient amount of RACM. Tr. 479-80; 483-84. As such, in Dushayne's view, quantities of Non-RACM or RACM below the trigger quantities may be "managed" without an operational permit. Tr. 415-16.

27. Menendez construed the Rule as implementing NESHAP with a permissible but more stringent local standard applicable to the handling of all ACM that meets the trigger quantity. He testified that Puerto Rico is unique to the extent that its regulations do not distinguish between friable and non-friable asbestos until the disposal phase, which then classifies the waste and designates separate sites for the disposal of friable and non-friable asbestos. Otherwise, Menendez explained, under Puerto Rico Law 9, a permit is required "if you're going to do anything with asbestos." Tr. 336. Regulation 422 (air) requires a permit for demolition; Rule 1005 requires a permit for disposal. Tr. 339.

28. EQB Rule 102, Definitions, states "Asbestos-containing material (ACM) [m]eans any material or product which contains more than 1 percent of asbestos (by weight)." AF Vol. 6 at 2746. EQB did not distinguish between friable and non-friable asbestos in its definition of ACM. Tr. 337-339; Tr. 448-50. Consequently, "management of ACM," under Rule 422 required an operational permit for "any material ... which contains more than 1% of asbestos (by weight)."

29. Neither the Contractor nor its on-site local asbestos consultant, Acevedo, ever suggested to the Contracting Officer at any time before to the termination that an operational permit was not required by EQB prior to commencement of the ACM abatement work. To the contrary, all parties, including the two local asbestos consultants hired by the A/E and Appellant, respectively, proceeded based upon the understanding that such a permit was required.

30. For disposal purposes, EQB does distinguish between friable and non-friable asbestos. Both are classified as a special waste and EQB restricts its disposal to two authorized areas, depending on whether the material was friable or non-friable.



EQB Rule 1005 of the Non-Hazardous Solid Waste Management (NSWM) regulations states as follows:

No person shall cause or permit the occurrence of a non-hazardous solid waste generating activity, without first obtaining a permit from the [EQB]. Where substantial quantities of non-hazardous solid waste will be generated at different locations, a separate permit will be required for each location.

While other jurisdictions in the United States may be more lenient in dealing with non-friable ACM, Tr. 267-68, EQB, Rule 422 (air), and Rule 1005 (disposal) cover both friable and non friable asbestos, and require two different permits; one dealing with the fugitive emissions and one with the subsequent disposal. Tr. 337-339; Tr. 416-17. In addition, Menendez explained that EQB requirements for worker protection do not distinguish between friable and non-friable asbestos, nor do the requirements for manifesting, containerizing, or transporting ACM by licensed special waste transport firms, Tr. 268-69, and there is no indication in the record that Lusa & Son's on-site asbestos consultant, Acevedo, disagreed with that assessment.

31. The record shows that Appellant understood that it was required by local regulations and by the terms of the contract to obtain both demolition and disposal permits. Robert Lusa testified that following the pre-construction meeting he called EQB and "explained the job to them and they said there'd be no problem in getting the permit," and one of "things they told me is I needed a plan and I needed my workers to get a refresher in Puerto Rico." Tr. 645. He elected not to obtain the permit at that time, however, but to wait until Bruce Lusa, the project superintendent, arrived in Puerto Rico, and then apply for the permit. Tr. 645-46. Thus, Robert Lusa explained that; "It was my intention to get the asbestos permit once my superintendent (Bruce Lusa) arrived in Puerto Rico and was setting up the job. Never at any time did I anticipate the difficulty of getting this permit without help." AF Vol. 6, at 2595.

32. While this statement may be unclear in respect to whether Lusa was referring to a disposal or demolition permit, later testimony clarified matters. He observed that the job was "...way behind schedule," but they were not doing any asbestos work "because we didn't have our permits and we didn't have some submittals returned." Tr. 675. Although it was argued at the hearing that a demolition permit was unnecessary, the record shows that Appellant planned to

remove the roofing felt on building 702 “when we got our permits and notification and submittals.” Tr. 760. Moreover, the record fails to show that Acevedo, Appellant’s Puerto Rican consultant, at any time suggested that the non-friable ACM on either building could be removed without a demolition permit.

**Contract Provisions and Preparations  
Prior to the September 6, 1999  
Start Date**

33. The contract specifications have two distinct elements: “General Requirements” and “General Requirements - Asbestos Abatement.” AF Vol. 5 at 2457. The technical specifications, drawings, addenda, and conditions, dated December, 1998, were prepared by Beato & Associates and govern scope of work. AF Vol. 5, Tab 133; Tr. 84.

34. The Quality Assurance provisions of Section 01546, Paragraph 1.4.A require the following:

Safety Meeting: Representatives of the Contractor shall meet with the Contracting Officer and his/her representative(s) prior to the start of work under this contract for the purpose of reviewing the Contractor’s safety and health programs and discussing implementation of all safety and health provisions pertinent to the work to be performed under the contract. The Contractor shall be prepared to discuss, in detail, the measures he/she intends to take in order to control any unsafe or unhealthy conditions associated with the work to be performed under the contract.... The level of detail for the safety meeting is dependent upon the nature of the work and the inherent hazards. The Contractor’s principal on-site representative(s), the general superintendent and his/her safety representative(s) shall attend this meeting. (AF 5, Tab 133, at 2485A)

Paragraph 1.5.C further states that:

If agreed to in writing at the safety meeting, other submittals shall be

required. One such submittal which may be included is a plan of action for handling hazardous materials.... (AF Vol.5, Tab 133, at 2485-86).

35. On June 29, 1999, Lusa & Sons was given notice of a Pre-Construction Meeting scheduled for Wednesday, July 14, 1999, at 10:00 a.m. at the RJCC. The purpose of the meeting was: "...primarily to introduce all participants, discuss center safety and security requirements, schedule, and go over the contract/paperwork. (AF Vol. 5, Tab 121, at 2426; Tab 133, at 2394; Tab 125, at 2362A).

36. The meeting convened as scheduled and was attended by We Lin Chang, Donagen's predecessor as Project Manager (PM), D'Navarte, Menendez and a RJCC official, Robert Lusa, Bruce D. Lusa, and Enrique Rodriguez representing Lusa. AF Vol. 5 at 2323; Tr. 632. Chang's report of the meeting states: "During walk-through of Building 759A's roof, it was noted that the existing roof slab appears to be lightweight concrete." AF Vol. 5, Tab 121 at 2323. The participants apparently did not, on this occasion, visit the recreation building. Tr. 633.

37. As a result of the July 14 meeting, Chang's report includes the following "required action" for the Contractor : "Submit permit application to EQB for asbestos abatement work ASAP." Id. During the meeting, Menendez discussed with Lusa representatives and the A/E the training requirements set for workers by Specification 02086, ¶ 1.3.4. AF Vol. 5, Tab 109. The record shows that the parties did not enter into a Section 01546, ¶ 1.5.C written agreement pertaining to the submittal of an action plan for handling hazardous materials at this meeting. Tr. 90-91; Tr. 191-192; Tr. 321; Tr. 634.

38. Specification Section 01301 addressed the submission and approval of submittals. AF Vol. 5 at 2508-2509. It provided that the Owner's Representative (the A/E or designee; in this case Menendez) would review each submittal, mark it to indicate the action taken, and return it promptly. AF Vol. 5, at 2509. Section 01301 also provided a checklist of the applicable submittals. AF Vol. 5, at 2509A-2511.

38. Section 01013 required the Contractor to submit a detailed Plan of Action for the demolition of the roofs and the removal of ACM. The plan was expected to include the location and layout of decontamination areas, the sequencing of asbestos work, the interface of trades involved in the performance of work, methods to be used to assure the safety of building occupants and visitors to the site, disposal plan

including location of approved disposal site, a detailed description of the methods to be employed to control pollution, protect employees, remove ACM without visible emissions in work area, and package the ACM debris. Section 01013 also required approval of the plan by the owner's representative prior to commencement of work. AF Vol. 5, Tab 133, pg. 2497. Tr. 298. For purposes of approving asbestos-related submittals, Menendez was the owner's representative. Tr. 302.

39. Section 01013 further required submission of an Asbestos Hazard Abatement Plan (AHAP). The AHAP contemplated:

a detailed plan of the safety precautions such as lockout, tagout, tryout, fall protection, and confined space entry procedures and equipment, and work practices to be used in the removal of materials containing asbestos. the (sic) plan may not be combined with other hazard abatement plans, shall be prepared, signed, and sealed by the owners Certified Industrial Hygienist. such (sic) plan shall include but not be limited to the precise personal protective equipment to be employed including, but not limited to, respiratory protection, personal protective equipment type and employment, location of asbestos control areas including decontamination stations, interface with other trades, and location of protective barriers and disposal containers. AF Vol. 5, Tab 133, p. 2498A (Emphasis added).

40. Donegan acknowledged that this provision requires an Asbestos Abatement Plan prepared, signed, and sealed by the Owner's industrial hygienist, and she did not know why this plan was not prepared. Tr. 97-101. Menendez, who drafted this provision, later testified that the reference to the "owner's industrial hygienist" in this section is a typographical error. The reference was supposed to require the Contractor's project engineer to prepare the plan. Tr. 328.

41. Section 01013 specifically identifies the ACM in both buildings (roofing felt with 35% Chrysotile asbestos on Building 702 and roof flashing with 7% Chrysotile asbestos on Building 759A) (AF Vol. 5, pg. 2497A), and mandated full owner occupancy during construction (AF Vol. 5, pg. 2498). In addition, Section 01013 required the contractor to submit to the Owner's Representative (the A/E or

designee) a number of specified submittals, including “evidence of EQB permits (PFE & AG).” AF Vol. 5 at 2498-2498A. The contract itself instructed the Contractor “not (to) begin work until” the Section 01013 submittals were “returned with Owner representative’s approval.” AF Vol. 5, pg. 2498.

42. Section 02086, in its Summary at ¶ 1.2, advises the Contractor that, “Under normal conditions, non-friable or chemically bound materials containing asbestos would not be considered hazardous; however, this material may release airborne asbestos fibers during demolition and removal, and therefore, must be handled in accordance with the removal and disposal procedures specified herein.”

43. In addition to the two asbestos-related plans discussed in Section 01013, Section 02086 includes a third asbestos abatement plan requirement. AF Vol. 5 pg. 2530-2533. Section 02086, ¶1.3.9 required the contractor to prepare an Asbestos Hazard Abatement Plan, (AHAP), using the services of an EQB qualified asbestos project designer, submit the AHAP to the Owner’s Representative for approval, and obtain written approval prior to initiating asbestos abatement activities. AF Vol. 6 pg. 2531; Tr. 176; Tr. 300.

44. Section 02086, ¶ 1.3.5 further directed the contractor to obtain required EQB permits and provide the approved permits to the Owner’s Representative prior to initiating asbestos abatement. Paragraph 3.2.4 provides that where the work is found to be in violation of Specification 02086, the Contracting Office will issue a stop order to be in effect immediately and until the violation is resolved. AF Vol. 5, pg. 2532A.

45. Robert Lusa understood the asbestos submittals requirements of the contract. He testified that as of October 17 or 18, 1999 Appellant had done “nothing” with respect to the approval of its asbestos submittals, not because it believed submittals were unnecessary, but as a consequence of its decision to wait until it had arrived on site in Puerto Rico before it drafted them. Tr. 745. Thereafter, he argued that Appellant did not commence the removal of the roofing felt on building 702 because it had not submitted and received approval of the submittal for the performance of the asbestos abatement work. Tr. 738-39. Dushayne agreed that the specifications were workable, T. 489-490, and eventually, Appellant turned in an AHAP “per Section 02086” three days after the substantial completion date, Tr. 689-699; Tr. 748. The record is clear that the timing of this submission had nothing

to do with any defect or ambiguity concerning Appellant's duty to prepare and provide asbestos submittals.

46. In late July and early August 1999, Appellant submitted four sets of submittals to the A/E. AF Vol. 5, Tabs 111, 113, 114, 118. None addressed the removal or disposal of asbestos. Transmittal No.1, submitted on July 27, 1999, set forth the Schedule of Values and the Contract Progress Schedule. AF Vol. 5, Tab 118, pg.2318. The Contract Progress Schedule provided that asbestos removal, demolition, and the installation of a temporary roof would commence on September 6, 1999. AF Vol. 5, Tab 118 at 2318-2320.

47. Transmittals No. 2 and 3 submitted on July 29, 1999, requested the approval of the Siplast Roofing System components to be used on the project, the Kem Kromick Universal Metal Primer, and the Industrial Enamel to be used on the Project. AF Vol. 5, pg. 2305. Transmittal No. 4 submitted on August 2, 1999, called for the approval of the Counter Flashing, the Edge Detail, the aluminum Kynar finish, and the color chart to govern the work. AF Vol. 5, Tab 111, p. 2278.

48. On August 25, 1999, Fred Muhlach, an architect acting on behalf of the A/E, verbally approved Submittals No. 2, 3, and 4. Tr. 199-204, 226. On September 9, 1999, the A/E verbally communicated to Robert Lusa the approval of all submittals, including Transmittal No.1. AF Vol. 6 at 2595; Tr. 168-69; Tr. 641. Although the contract called for review of all submittals by the A/E, and the return of those submittals to the Contractor in a reasonable period of time, *See*, Section 01300, Paragraph 1.5.A, Lusa did not complain about receiving verbal approval. *Id.* *See also*, Tr. 640-42; Tr. 169-171, 207 and 239; Tr. 239-40; Tr. 638-640. To the contrary, while verbal action is not the "usual way" submittals are approved or otherwise acted upon, Tr. 206; Tr. 222-223, Robert Lusa confirmed that he requested that the A/E keep the written approvals until his crew arrived in Puerto Rico rather than mail them to him in Florida. AF Vol. 6, pg. 2595.

49. D' Narvarte testified that he thought the materials submittals were returned on October 28, 1999. Tr. 206-07; Tr. 211; Tr. 227. Robert Lusa testified that the approved submittals were not returned until the Site Meeting held on December 8, 1999. In either eventuality, however, delay in the return of the written approvals did not delay Lusa & Sons's purchase of materials or the start date of the work.

50. Thus, D’Narvarte, the A/E, testified that the materials submittals were approved verbally in August of 1999, but he testified that; “We asked if he wanted us to send them back the approvals, which he answered that we can retain them until he arrives in Puerto Rico, so we can deliver them to him in the first construction meeting.” Tr. 168-70. Robert Lusa confirmed D’Narvarte’s account of this conversation in his January 24, 2000, letter to the Contracting Officer. Lusa reported that on September 9, 1999, “D’Narvarte asked me if I wanted them sent back through the mail or could he give them to my superintendent (Bruce Lusa). I told him to please give them to our employee on the job site.” AF Vol. 6, pg. 2595. That meeting was then scheduled for October 28. Tr. 169.

51. At the hearing, Appellant adduced the testimony of Charles Truett relating to scheduling delays encountered in the course of performance. Truett, a registered engineer, retired from the Army Corp of Engineers after a twenty-seven year career. Tr. 523. Truett testified that it was his understanding that Appellant appropriately delayed the start date while waiting a reasonable time to get written confirmation of the verbal approval. Tr. 574. This understanding, however, is incorrect. The record shows that Appellant agreed to proceed on the basis of the verbal approvals. Tr. 239. The materials were purchased and sent to the job site as planned when the job was bid, and according to Robert Lusa, as recounted in his January 24, 2000, letter to the Contracting Officer, the purchase and mobilization processes “went according to plan” and the “materials and equipment made it to Puerto Rico in a timely fashion.” AF Vol. 6, pg. 2595.

52. Robert Lusa testified that he expected the return of written approvals within a few days of the verbal approvals and was delayed when he did not receive them, but his testimony is contradicted by his own correspondence. *Compare* AF Vol. 6 Pg 2595 *with* Tr. 641-42; Tr. 739-40. The Contracting Officer’s delay in returning written approval of Appellant’s materials submittals had no impact on Appellant’s mobilization plans or the timing of its decision to purchase materials.

53. The contract Progress Schedule designated September 6, 1999, as the date work would commence. As of that date, however, materials had not been ordered, asbestos permit applications had not been filed, asbestos submittals had not been prepared, and Appellant’s work crew had not arrived at the work site.

54. In mid-October 1999, Lusa informed the A/E that it had mobilized its materials and personnel at the project site and was prepared to commence work.

During the period between the pre-construction meeting and mobilization, We Lin Chang had been replaced as Project Manager, (PM), by Pamela Donegan. Tr. 42-45.

### **Actual Start of Work**

55. Based upon the verbal approvals received a month earlier, Robert Lusa, on October 7, 1999, ordered materials for shipment to Puerto Rico via Jacksonville, Florida. Tr. 642; Tr. 626-31. By letter dated October 13, 1999, Appellant submitted its First Pay Request in the amount of \$159,480.00. That amount reflected Appellant's mobilization costs and material costs incurred in conjunction with performance of the work. Tr. 643; AF Vol. 5, at 2256. The government received that request on November 3, 1999. AF Vol. 4, at 2065. On December 27, 1999, the Department of Labor, Division of National Program Support recommended payment to Lusa & Sons of \$159,480. AF Vol. 4, at 2065. The invoice was paid in full after termination of the contract. Tr. 126; Tr. 172; 780; *See also*, Appl. Proposed Finding 63.

56. Materials were delivered in bulk to the Project site on or about October 14, 1999, and immediately after delivery, Appellant commenced the process of removing portions of the two roofs. Tr. 671. Bruce Lusa, Robert's uncle, served as Appellant's Project superintendent. Enrique Rodriguez was its project foremen. Tr. 646. Lusa & Sons planned to get the asbestos permit once its superintendent arrived in Puerto Rico. Tr. 644-646; AF Vol. 3, Tab 57, at 1470. Menendez offered to assist Lusa & Sons in contacting the EQB and suggested a company that could certify Appellant's personnel. Tr. 284-86.

57. According to Robert Lusa, the initial work involved demolition of field base sheet and the removal of the gravel and built up asphalt roof on the Cafeteria Building, 759A. Tr. 672-73. A temporary roof was installed on the cafeteria and the crew then moved to the Recreation Building, where it removed the upper layers of gravel and pitch on the roof. Robert Lusa testified that the underlying felt

layer and mastic asbestos containing materials were not removed pending receipt of appropriate permits and approvals, Tr. 673-675, and that the work on the upper layers of the roof was performed using manual tools. Tr. 673. He further testified that none of the work disturbed any ACM in either roof, Tr. 673; 675, and the debris was tossed into a dumpster. Tr. 673-74.



58. On October 26 and 27, 1999, the A/E's asbestos consultant and "project monitor," Menendez, notified the A/E that Lusa & Sons had not yet had its asbestos workers trained for Puerto Rico certification, ( AF Vol. 5, Tab 109. *See also*, Tr. 56), and asked the A/E to remind it of the contract's submittal requirements and to invite Lusa & Sons to contact him if assistance was needed with EQB requirements. AF Vol. 5, Tab 108; Tr. 284-86.

59. The next day, October 28, 1999, Donegan conducted her first of four site visits, accompanied by D'Narvarte, Menendez, Bruce Lusa, and others. Tr. 46; 53. By this time, Appellant had started installing the temporary roof on Cafeteria Building 759A and was approximately 50% complete. Upon inspection, Menendez concluded that the Appellant had removed ACM flashing from portions of the perimeter and interior of the roof at Building 759A, Cafeteria Building, and concluded that the Appellant was in violation of local laws. AF Vol. 5, Tab 106, pg. 2271. He recommended that Lusa & Sons immediately stop the removal of ACM, continue with non-ACM sections, protect and cover ACM contaminated roofing material for subsequent containerization, and comply with project asbestos specification and Commonwealth law. AF Vol. 5, Tab 106, p. 2271; Tr. 304-05. Menendez's comments were limited to the Cafeteria Building, 759A.

60. Although she had limited experience with asbestos removal on roof replacement projects, Tr. 48, upon inspection of the buildings, Donegan, in consultation with Menendez, concluded that Appellant's crew had removed ACM from Building 759A and disposed of it in a dumpster with uncontaminated materials. Tr. 270. AF Vol. 5, Tab 107, pg. 2272; Tr. 46; 49, 57-58. At the time, Appellant had not yet obtained EQB permits or filed its asbestos submittals.

61. The Site Visit Report of that Meeting indicated that the Contractor had improperly removed portions of the "perimeter fascia board" which allegedly included ACM in the form of mastic. (AF Vol. 5, Tab 107, p. 2272). The contract specifications, however, identified asbestos containing materials in Building 759A only in 1,000 sq/ft of flashing. No mention of ACM in the "perimeter fascia board" is set forth in the contract documents. AF Vol. 5, Tab 125, pg. 2344, Item 21, Summary of Work, Amendment 3 to IFB. The Site Visit Report charges no infractions of ACM requirements on Building 702 as of October 28, 1999.

62. Donegan reported that Appellant was delinquent in filing asbestos submittals and permits, and had not complied with federal, state and local codes. Donegan acknowledged that she relied upon Menendez to determine compliance

matters associated with the technical specifications relating to the asbestos abatement provisions of the contract. Tr. 110. See also, Tr. 171, Tr. 173; Tr. 279.

63. D’Narvarte testified that flashing and the gravel stop served two different functions but were one and the same on building 759A. Flashing was composed of several components, including the wood nailers, the roofing material, per se, and the flashing or the gravel stop. Tr. 193-94. The flashing seals the perimeter of the building to prevent water from getting between the roof slab and the roofing system. Tr. 193-94. The gravel stop prevents the gravel from falling from the roof, and according to D’Navarte, was “same piece of metal” as the flashing . Tr. 195.

64. The Typical Existing Flashing Detail (AF Vol. 5 , Tab 105, pg. 2270) was included as a part of Contract Drawing ED-1, incorporated by Amendment, and attached to Robert Lusa’s October 29, 1999 letter to the A/E, AF Vol. 5, pg. 2266, provides a blow-up of the existing roofing at the Cafeteria Building 759A. The drawing shows the intersection of the cafeteria building roof and the cafeteria building walls and an “existing nailer,” covered on its top and outer edge by “existing asbestos containing flashing.” In addition, as noted in Finding 17, *supra*, Specification 01013 indicated that the flashing thickness was approximately 6 inches. AF Vol. 5 Pg. 2268.

65. The demolition notes (AF Vol. 5, Tab 105, pg. 2269) relating to Cafeteria Building 759A, call for the following:

1. Contractor is to remove asbestos containing flashings as per asbestos abatement specifications...
3. Contractor is to remove and dispose properly of all slag stone and existing roof system. Lead flashing is to be disposed properly and/or recycled it... (AF Vol. 5, pgs. 2269 and 2270).

66. At the hearing, Robert Lusa testified that 20 to 25 percent of the flashing was missing from Building 759A. (Tr. 623). He later stated that the building had no flashing whatsoever, (Tr. 680, 771) and, accordingly, the work on Building 759A involved no ACM exposure at all. He insisted that his crew swept back the gravel and found no

flashing on the building. Tr. 679-80; 771-72; 785-86; Tr. 790-91. Lusa's testimony was thus internally inconsistent, (first contending that only 20-25% of the flashing was missing and then denying that the building had any flashing at all) and inconsistent with contemporaneous documents. Unlike his testimony at the hearing, in his dealings with the Contracting Officer, Robert Lusa distinguished the flashing from the gravel stop, (See, AF. Vol. 5, pg. 2266), but there is no record that he ever suggested that Building 759A had no flashing at all or that Specification 01013, the demolition notes, and drawings of the flashing on the building were in error.

67. On October 29, 1999, Robert Lusa wrote to the A/E that his crew had removed only the gravel stop/edge on Building 759A. AF Vol. 5, Tab 105. He emphasized a distinction between roof flashing, which was mentioned in the asbestos Specifications, and gravel stop/edge, which was not mentioned as ACM; and noted that if the gravel stop contained ACM, the Government had the obligation to inform the Contractor of the location of all asbestos areas on the buildings. (AF Vol. 5, Tab 105, pg. 2266.). While Robert Lusa denied that his crew removed any flashing from Building 759A, he did not suggest that Specification 01013 or the drawings which showed flashing on Building 759A and demolition notes he attached to his October 29, 1999 letter, were in error. AF Vol. 5 pgs. 2266-2270.

68. Photographs of the roof and area around Building 759A were taken on October 28, 1999 and December 8, 1999 and were admitted into evidence. (AF Vol. 6, Tab 2, page 2682 (Photos 1 and 2)); p. 2693 (Photos 23 and 24) , p. 2694 (Photos 25 and 26) , and p. 2695 (Photos 27 and 28). No metal flashing is shown in these photos. Photos 25 and 26 show bagged waste material from the roof of Building 759A.

69. Based upon the photographs, Dushayne testified that Building 759A had no separate flashing and that a portion of a rotted wooden nailer shown in photos number 1 and 30 indicated the absence or the inadequacy of the flashing. Tr. 429. Asbestos in the flashing would appear either as mastic within the felts or in the flashing itself.

Tr. 443.

70. Dushayne further explained that the gravel stop, a “T” shaped piece of metal, is separate and apart from the flashing, and that, in his opinion, the edge condition on Building 759A appeared to have had no separate flashing assembly to join the field felt with the edge, and only the edge metal was removed, not the felt. Tr. 427-430. Dushayne acknowledged, however, that he was not specifically familiar with the flashing on building 759A and had not seen it before Appellant had started its work, Tr. 443. He testified that the design of this roof could have been consistent with a piece that served as both gravel stop edge and flashing. Tr. 444.

71. On October 30, 1999, Menendez informed the A/E that, based on his review of Robert Lusa’s October 29 correspondence, the Specifications placed the contractor on notice of the location of ACM on Building 759A, (AF Vol. 5, Tab 104), and that the ACM was identified to the contractor during the site visit when Lusa & Sons was directed to stop ACM-related work and comply with requirements for asbestos submittals prior to resuming that work. Id. He also notified the A/E that he was:

[E]xtremely concerned this contractor is intending to proceed without Submittals and required asbestos permits. Lusa Inc. appears not to even have read the specifications and ignored info provided during pre-construction regarding commonwealth unique hazmat regulations. Regardless of the contractor’s perception, the following actions must be initiated immediately:

Stop work at asbestos identified areas/materials  
Protect asbestos containing materials already  
removed (containerize)  
Insure contractor compliance with required  
asbestos submittals prior to work.  
AF Vol. 6 at 2586; AF Vol. 5, Tab 100.

72. On November 1, 1999, Lusa & Sons informed the A/E that it had identified 400 linear feet of rotten wood on Building 759A, provided an estimate of the time and cost required for replacement, and sought an equitable adjustment in contract price and time to compensate for such work. (AF Vol. 5, Tab 103, p. 2263). The A/E took no action on that notification of additional work at the time, because he gave priority to resolution of the asbestos-related contract compliance issues. Tr. 174.

### **Cease and Desist Order**

73. On November 9, 1999, the Contracting Officer issued a Cease and Desist order, by facsimile, directing Appellant to stop all ACM-related work until it complied with contractual requirements for permits and approved submittals. AF Vol. 5, pgs. 2245-46. Tr. 55; Tr. 173; Tr. 304-305. The instances of non-compliance with asbestos-related contract requirements cited in the cease and desist order were determined by Menendez. Tr. 246-47; Tr. 361-375. It should be noted that the dates stamped on the top of the first page of this document, November 17 and 18, 1999, do not represent the dates of transmittal or signature by the Contracting Officer. The document was apparently transmitted to the Contractor by fax on November 9, 1999, as cryptically indicated on the lower right corner of the first page.

74. The Cease and Desist Order required Lusa & Sons to provide all required submittals and permits prior to the start of asbestos related work; comply with all federal, state, and local codes, including the Puerto Rico EQB requirements regarding asbestos-containing materials; and comply with contract specifications regarding the proper and safe removal, disposal, and handling of asbestos-containing materials. The letter further noted that failure to follow the Order would be considered a breach of contract authorizing the Department of Labor to seek termination of the contract. AF Vol. 5, Tab 97, pg. 2245. The order did not stop any work in areas unaffected by ACM. Tr. 305.

75. Although the Cease and Desist Order addressed only asbestos abatement work, Lusa & Sons, in response to the order, ceased all work covered by the contract. Tr. 737-38.

76. On November 10, 1999, Lusa & Sons responded to the Cease and Desist

Order and provided assurances of its intent to comply fully with the abatement of all ACM in accordance with the requirements set forth by all federal, state, and local codes for the proper and safe removal, disposal, and handling of asbestos containing materials. (AF 5, Tab 96, pg. 2244). In that same letter, Appellant informed the Government that it hired a consultant to help secure permits, subcontracting the asbestos abatement work to a contractor in Puerto Rico, (AF Vol. 5, Tab 96, pg. 2244), and submitting the asbestos-related submittals by "...overnight mail to Beato...." *Id.* See also, AF Vol. 4, Tab 95; Vol. 6, Tab 1, Item 5; and Tr. 754. 46.

77. At the hearing, Lusa testified that Appellant did not perform any asbestos work before the Cease and Desist Order issued "Because we didn't have our permits and we didn't have some submittals returned." Tr. 675. He further testified that Appellant planned to remove the roofing felt on building 702 "when we got our permits and notification and submittals." Tr. 760, and that, indeed, no ACM had been removed from either building as of December 16, 1999. Tr. 702-03; 707; 708; 710. Lusa acknowledged that no permits or abatement submittals had been filed as of the date the Cease and Desist Order issued, but he denied that any abatement work had taken place. Tr. 711; 714.

78. In Dushayne's view, Appellant had done nothing to justify the order. He testified that a permit for disposal of asbestos under Rule 1005 may have been required, but he noted that work had stopped pursuant to the Cease and Desist Order before the disposal phase of the project had been reached. Tr. 416; 447; 451. Further, as a non-friable category 1 material, it would not, Dushayne opined, require bagging under OSHA or NESHAP, Tr. 479, and in Puerto Rico, it only had to be bagged for disposal not storage. Tr. 479.

79. On November 11, 1999, Appellant requested a change to the contract to compensate for additional air conditioning supports. The request was for \$775.00 and three additional days for contract performance. Appellant received no response to that request. AF Vol. 6, Tab 1, Subtab 9, p. 2607.

80. On November 15, 1999, Appellant requested a change to the contract to compensate for costs to raise the electrical feed. That request was similarly for \$775.00 and three additional days for contract performance. Appellant received no response to that request. AF Vol. 6, pg. 2608.

81. On November 17, 1999, Appellant requested a change to the contract to

compensate for additional costs incurred in responding to a differing site condition relating to the electrical chase at Building 702. Such request sought an additional \$1,625.00 and five days of contract time. Appellant received no response to that request. AF Vol. 6, Tab 1, pg. 2609.

82. Appellant informed the EQB on November 19, 1999, that it had retained Jose Acevedo of J. Acevedo & Associates as its Consultant to assist in meeting EQB requirements relating to asbestos abatement (AF Vol. 6, Tab 1, Subtab 6, p. 2603) and subsequently gave further notice to the Contracting Officer's Project Manager of the hiring of Mr. Acevedo. AF Vol. 6, p. 2602; Tr. 685-86.

83. On December 6, 1999, Robert Lusa wrote to the Project Manager:

Another issue that I would like to address is that the contract time for this job is soon to expire. In reviewing what has been done and still needs to be done before job completion I feel we will surpass this date at no fault of the Department of Labor. However, we did turn in some extra work (minor amount) to the Architect for approval, that has lead [sic] us to the requirement of additional days.

Before I close I would like to let you know that we are close to obtaining our asbestos permit from the EQB. R.F. Lusa & Sons has hired an Independent Consulting Firm from Puerto Rico to assist us in this endeavor. AF Volume 6 at 2602. Tr. 133.

84. Acevedo submitted the qualifications of Environmental Health and Safety Services to the Director of EQB of Puerto Rico on December 7, 1999 as part of the process of obtaining EQB permits. AF 4, Tab 95, p. 2141.

85. The Project Manager Donegan conducted a site visit on December 8, 1999, along with D'Narvarte and Menendez, and together they determined that Lusa & Sons had violated the Cease and Desist Order by removing approximately 25 percent of the roofing layers on Building 702 without approved submittals or permits. AF Vol. 4, Tab 94. Tr. 54-55; 61-62; 64-65; Tr. 154-55. Although the report did not mention a distinction between the gravel and tar comprising the upper portion of the

roof on Building 702, and the bottom layer of felt and mastic which constituted the ACM requiring abatement at the Recreation Building, 702, AF Vol. 4, Tab 94, p. 2139, Donegan testified that she relied upon Menendez who advised her that asbestos submittals were required for the work which had been done. Tr. 110. The A/E also relied upon Menendez to determine the Contractor's compliance with the asbestos abatement specifications of the contract and the Cease and Desist Order. Tr. 168; Tr. 264.

86. According to the report of that Site Visit, approximately 90% of the old roof had been removed from the Cafeteria Building 759A and the temporary roof was in place. The report noted the presence of asbestos containing material in "areas along the perimeter" of the building which "... cannot be removed until all submittals, codes and regulations are followed." AF Vol. 4, Tab 94, pg. 2139-40.

### **Substantial Completion Date**

87. On December 13, 1999, the contractual Substantial Completion date passed. AF Vol. 6, pg. 2676. At the time, contract work was only 45% completed, and a significant amount of work was needed before the roofs were capable of being used as intended. AF Vol. 6, pg. 2674-75; AF Vol. 3 Pg. 1469; AF Vol. 6, pg. 2594.

88. Appellant received a demolition permit from EQB on December 13, 1999, Tr. 686-87, and a disposal permit from EQB on December 22, 1999. Tr. 689-90; Tr. 717; Tr. 757. By December 30, Appellant had its EQB permits and transmitted its roofing submittals to the A/E. Lusa testified that Appellant "was trying to get going with some of this asbestos abatement work." AF Vol. 4, pg. 2077; Tr. 690; 701-02. As previously noted, at Finding 77, *supra*, Lusa testified that no ACM had been removed from either building before the permits and submittals were transmitted. Tr. 680-81; 702-03; 707-08.

89. On December 14, 1999, the A/E directed Lusa & Sons to respond to the A/E's consultant with an action plan. AF Vol. 4, Tab 90, pg. 2135. Tr. 68. Two days later, December 16, 1999, Appellant submitted six copies of its asbestos submittals to Beato & Associates. AF Vol. 4, Tab 89, pg. 2076; Tab 86, pg. 2072; Tr. 714. On January 3, 2000, Lusa submitted its revised asbestos submittal referencing specification 02086. AF Vol. 4, Tab 72. *See also*, AF Vol. 3 at 69.14. Appellant replied to the A/E on January 3, 2000. AF Vol. 4, Tab 72, pg. 1987. Its response consisted of two separate submittals - one, dated January 3, 2000, which included



the operations permit issued by EQB on December 13, 2000. (AF Vol. 4, Tab 72, pg. 1988). The second submittal was dated December 30, 1999 and included a second EQB permit dated December 22, 1999. AF Vol. 4, Tab 72, pg. 1993. Included as a part of these submittals was an extensive Hazardous Abatement Plan prepared by Ramon Ramirez, Asbestos Project Designer for Advanced Engineering Services. AF Vol. 4, Tab 72, pg. 2005.

90. Over the next few days, the A/E's asbestos consultant, Menendez, contacted Lusa several times to ensure that asbestos abatement did not resume based on the January 3 submission. AF Vol. 4, Tab 78, pg. 2062. The A/E's consultant directed Lusa & Sons not to disturb, remove, or handle ACM material until the submittals were reviewed and approved. That direction was further confirmed by subsequent memos dated January 8 and 9, 2000. AF Vol. 4, Tab 77, pg. 2061 and AF Vol. Tab 75, pg. 2059; AF Vol. 6 at pgs. 2629-31. On January 13, 2000, Lusa & Sons submitted an amended Work Plan to the A/E. AF Vols.3 and 4, Tabs 69 and 70, pp. 1495 ;1984.

91. Menendez reviewed Appellant's asbestos submittals, determined that they were deficient, and rejected them. The deficiencies he noted followed a Submittal Checklist included as a part of Specification Section 01301, AF Vol. 3, Tab 85, pg. 2070; AF Vol. 4, Tab 84 and 85; Tr. 289, and included, *inter alia*, the lack of location and layout of asbestos control areas, lack of asbestos work sequencing, and invalid worker certifications and waste licenses and forms. Tr. 271-73. *See also*, Tr. 68; Tr. 124-125; Tr. 370-371. Appellant's initial submittal showed that Lusa & Sons personnel were going to perform the abatement with Bruce Lusa as the supervisor. Later, without notifying the A/E, Appellant designated Environmental Protection Group to perform asbestos work, but Menendez found twenty-four expired EQB identification cards for EPG personnel. Eventually, Appellant identified the abatement company Seperarie as performing asbestos work. Seperarie, however, was not designated in the EQB permit. Tr. 271-72.

92. In addition, Appellant had obtained an EQB permit for the removal of 20 cubic yards of ACM. The attached work plan submitted to EQB showed five hundred linear feet of roof framing and a total of five cubic yards of waste. Tr. 273; 277.

93. The contract described the area of ACM in terms of square feet not the volume in cubic yards. Menendez testified that he converted square feet to a volume

measurement in cubic yards multiplying by the length by the width by the depth and dividing by 27, then adding in a factor to include the worker protection equipment. Tr. 263. He concluded that the job generated 80 cubic yards of ACM waste and that a permit for 20 cubic yards was inadequate to deal with the ACM on this project.

94. Dushayne noted that for purposes of complying with Rule 1005, a volume less than fifteen cubic yards a week requires no permit. He estimated the volume of ACM on this job at 92.5 cubic yards by assuming an ACM thickness of one inch, Tr. 484, and concluded the permit estimate of 20 cubic yards was “an understatement of the waste.” Tr. 486.

95. While Robert Lusa, Dushayne and Menendez differed in respect to their estimate of the thickness of the ACM for purposes of calculating the volume of material present, contract specification 01013 estimated the thickness of flashing on Building 759A at 6 inches, and only Menendez physically examined the roof on Building 702. Both Menendez and Dushayne considered the estimate provided to EQB for the permit an understatement of the volume of ACM the job involved, and as a result, the permit did not allow for removal of enough ACM waste to accommodate the volume of ACM debris generated by the project as estimated by both Menendez and Dushayne.

96. The contract did not require the approval of the permits by the A/E, per se, but it did require the Contractor to submit them, and it afforded the A/E an opportunity to assess their adequacy to accomplish the work the job required. Tr. 112-113;116; Tr. 196-97; Tr. 254-55; Tr. 271-72. Because the volume of ACM waste covered by the permit was inadequate, the permit itself was inadequate for the purpose of removing all of the ACM waste generated on this project as required by the contract.

97. On December 23, 1999, the Menendez inspected the project site and reported that apparent ACM material had been removed from the roof of Building 702 and placed in an open container near that building. He also reported that a similar open container was found near Building 759A. AF Vol. 4, Tab 82, pg. 2067; AF Vol. 6 pg. 2627.

98. Dushayne acknowledged that a picture of a container (photo 15) showed the presence of felt, however, he could not determine if it was RACM under federal standards, because if it were removed manually, it remained “intact” by OSHA standards, and was category 1 non-friable under NESHAP. Tr. 445-46. Although the

contract specifications identified 30,000 square feet of ACM on Building 702, in Dushayne's opinion, the amount of RACM was zero. Tr. 447-448.

99. ACM is disposed of as special waste in Puerto Rico at approved landfills. Tr. 478. Dushayne opined that EQB requirements with respect to bagging were not triggered until the final disposition in the landfill because, in his opinion, this was not a permitted job. Tr. 479. Accordingly, the bagging which the contractor had performed was, he reasoned, adequate for category one non-friable asbestos. Tr. 478-79. He acknowledged, however, that ACM work typically would not commence without at least partial approval of the submittals, Tr. 491, and he conceded that asbestos related activities did occur prior to the issuance of the permits and prior to approval of Appellant's asbestos-related submittals. Tr. 480-81; Tr. 483-84. Menendez visited the jobsite on January 2, 2000, and observed Bruce Lusa bagging what he believed was ACM without proper personal protective equipment. AF Vol. 4, Tab 80. Pg. 2064; Tr. 277-78.

100. On January 10, 2000, the A/E forwarded the EQB permit submittals to Menendez for review. AF Vol. 4 Tab 72, pg. 1986. Menendez testified that he later learned that a different firm, Seperarie Abatement Company, was going to perform the work and this surprised him because the initial submittal showed that Lusa personnel were going to perform the abatement with Bruce Lusa as the supervisor. Later, EPG Environmental Protection Group was designated to perform asbestos work, and finally Seperarie was identified as performing asbestos work but was not designated in the EQB permit. Tr. 272. In the second submittal, Menendez found twenty-four expired EQB identification cards for EPG personnel. Tr. 273.

101. On January 13, 2000, the Project Manager Donegan conducted a site visit. Menendez, Bruce Lusa, and Acevedo, were present. Donegan reported as follows:

Bldg 759A - Cafeteria: Since the asbestos submittals have not been approved, and the asbestos permits have not been received since the last site visit, not much progress has been made. The contractor seems to have completed as much work as possible, that is not related to asbestos abatement. The dumpster that contains the ACM still remains open and in violation of federal, state and

local codes.

Bldg 702 - Recreation: Since the asbestos submittals have not been approved, and the asbestos permits had not been received since the last site visit, not much progress has been made. However, the contractor has removed more old roofing, which contains asbestos mastic, and placed the new temporary roof over the surface. When it was mentioned to the contractor that the roofing surface must be inspected and approved by the A/E as asbestos-free, the contractor refused to remove any of the temporary roofing. As an effort to work with the contractor, the A/E's asbestos consultant suggested taking core samples in the temporary roof areas, in which the costs shall be borne by the contractor, to test for asbestos in the layers. A total of approximately 6,100 sf of old roofing has been removed to date, without proper asbestos approvals.

A substantial amount of acm from this roof was placed in a sealed container, but was found unbagged and unwrapped in direct

violation of federal, state and local codes.

There was also no fall protection on the perimeter of the roof for the workers, which is also a violation. AF Vol. 3, Tab 68, pg.1491.

102. Donegan further reported that the project was 31 days past the Substantial Completion date and only 45% complete. Id. at 1492.

103. With respect to the amended Work Plan, Menendez concluded that it

was not consistent with the contract specifications and that ACM violations continued to exist at the Buildings. AF Vol. 3, Tab 67, pg. 1490; Tab 64, pg. 1484; Tr. 277-78. He identified numerous deficiencies in Lusa's submittal. For example, he stated "Contractor failed to provide specific information regarding work practices and procedures for the Ramey JCC, noted in initial submittal review." *Id.* at 1484. Further, he noted that the "EQB permits expire on 10 Feb 00 [AF Vol. 3 at 1498], which may not be a realistic completion date for ACM removal." *Id.*

104. In addition, Menendez testified he saw during the site visit a yellow piece of machinery, a grinding machine, on the roof, and the presence of this machine, coupled with what he believed were indications of scarring on the concrete surface of the roof on Building 702, led him to conclude that Appellant had improperly used a sander or grinder to remove patches of roofing felt or mastic residues. Tr. 282-84; 289. Tr. 303-04. Tr. 341. Menendez did not actually see aggregate mixed in with roofing felt. Tr. 342-43.

105. The record includes photographs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 42 which depict conditions relating to Building 702 and/or general conditions at the Project site. AF Vol. 6, pgs. 2681-2702. Dushayne believes that many of the pictures show only that the gravel ballast was spudded off or removed from Building 702, not the felt, Tr. 422-23, however, he did note that he "saw indications" of ACM removal including felt from Building 702 in photo 15. Tr. 445-46; *see also* Tr. 478-81.

106. Appellant denied that any felt was removed from Building 702 or that a grinding machine was ever used. Dushayne testified that the pictures show hand tools such as spudbars, scrapper blades, and a hand axe indicative of the manual methods of demolition which which leaves material "intact" under the OSHA rules and non-friable RACM under EPA rules. Tr. 421-422. He also concluded that a grinder was not used, because residual material that a grinder probably would have removed was present. Further, he opined that the marks on the roof were consistent with use of hand tools, with linear rather than the circular striations a grinder might cause. Finally, Dushayne interpreted the smooth, lighter area on the roof as merely the reflection of the sun. Tr. 475-77. Nevertheless, Dushayne saw indications that ACM felt had been removed, *See*, Tr. 445-46; Tr. 480-81, and whether it was removed manually or by machine, these observations refute Appellant's denials that

any felt was removed by any method.

107. Lusa & Sons failed to place warning signs or a tape barricade around ACM containing dumpsters. Tr. 311-12.

### **Show Cause Notice**

108. On January 18, 2000, the Contracting Officer issued a Notice to Show Cause why the contract should not be terminated for default, based on the Contractor's failure to comply with the Cease and Desist Order for continuing to remove ACM without abatement submittals and EQB permits. AF Vol. 3, Tab 63, pgs.1481-1482. Menendez did not participate in drafting the Notice. Tr. 361-75.

109. In his response to the Show Cause Notice on January 24, 2000, Robert Lusa denied that his crew removed asbestos after receiving the Cease and Desist Order. He asserted that: "The ...Asbestos Consultant did not look at the roof on building 702 during the first site inspection. If he had he would have found that the work had been done prior to the first inspection. **No additional asbestos was removed after the Cease and desist order.**" AF Vol. 3, pg 1469. (Emphasis added). Lusa continued:

In regard to the continuation of old roof removal on building 702 (1700SF) base sheet layers and installation of a temporary roof the only work performed was the installation of the temporary roof. Worker did not remove any additional roofing before putting the temporary roof on due to the Cease and Desist Order. Instead, the temporary roof was installed over it to insure the building remained watertight during the Holiday Season.

I would like to retract a statement made in a previous letter dated December 6, 1999 letter (attachment #4 [AF Volume 6 at 2602]) to Pam Donegan, stating the delays on the project were at no fault of anyone except ourselves. At the time I felt that pointing fingers wouldn't solve anything. The fact of the matter was that on July 29, 1999, I turned the submittals in for approval and did not receive a response until September 9, 1999. At this time Mr. D'Narvarte asked me if I wanted them sent back

through the mail or could he give them to my superintendent (Bruce Lusa). I told him to please give them to our employee on the job site. In reviewing the returned submittals I noticed they had been approved on the 25 of August by Fred Muhlach, AIA, making me wonder what the delay could have been and why I needed to call a couple of times before getting the final approval, delaying us even longer. In looking back perhaps I should have been more insistent on getting the approval of the submittals sooner knowing we were on such a tight time schedule.

When this job was bid my original game plan was to get all our submittals approved, order the materials here in Florida have them delivered to the Packing Company in Tampa, Florida, then ship them to Jacksonville, Florida where they would be shipped to Puerto Rico. All of this took time to prepare and coordinate. Fortunately, this process went according to plan and the materials and equipment made it Puerto Rico in a timely fashion. It was my intention to get the asbestos permit once my superintendent (Bruce Lusa) arrived in Puerto Rico and was setting up the job. Never at any time did I anticipate the difficulty of getting this permit without help. As a result, on November 15th 1999 we contacted Jose L. Acevedo of J. Acevedo & Associates to help us obtain a permit. On November 19th we hired Mr. Acevedo to represent us in the preparation of obtaining the required documents to receive a permit from FQB. (Attachment #5; AF Vol. 6 at 2603).

We also hired an asbestos company named Environmental Protection Group Corp to do some of the asbestos work with us. According to a certificate provided to us from EPG, their certification does not expire until September of the year 2000. This is contradicting a note from Angel Menendez [the A/E's asbestos consultant] stating that their license expired in 1997 (Attachment #6;

AF Vol. 6 at 2604). AF Vol. 3 Tab, 57, pg. 1469; AF Vol 6 at 2594-95. Id.

110. The January 24 letter had 11 attachments, including three letters (Attachments 9-11), addressed from Lusa to the A/E, which identified additional work that Lusa considered necessary to complete the project. AF Volume 6 at 2607-09. The total estimated cost and time required for completion of work described in the three letters were \$3175 and 11 days, respectively.

111. At about this time, Menendez scheduled a meeting with Bruce Lusa at the job site in order to discuss how Lusa & Sons could come into compliance with the contract's ACM abatement requirements. Bruce Lusa, however, did not appear at that meeting. AF Vol. 3, Tab 56. Tr. 287 and 764-65. AF Vol. 3, Tab 54.

112. Several days later, on January 27, 2000, Menendez, met with Bruce Lusa and Appellant's asbestos consultant, Acevedo, to review a partially revised asbestos submittal. AF Vol. 6 at 2657-58 and 2670. At that time, Menendez raised concerns about Appellant's failure to address previously identified problems and its plan to have a subcontractor perform all ACM abatement work. Id. Menendez also noted that several of the certifications and one of the EQB permits submitted had expired. Id. AF Vol. 6, pgs. 2667-69.

113. On January 28, 2000, Menendez reviewed Lusa & Sons' response to the Show Cause Notice. AF Vol. 6 at 2610-12. His report recapitulated his dealings with Lusa & Sons from July, 1999, through January, 2000, addressed allegations by Robert Lusa that no ACM had been removed since the issuance of the November 9, Cease and Desist Notice, and referred to his observations of ACM removal on December 8, 1999; January 13, 2000; and January 17, 2000. Id. Menendez also responded to the assertion that the contractor had not anticipated the difficulty of getting permits without help, observing that he had informed Robert Lusa in July, 1999, "regarding the peculiarities of Asbestos activities in Puerto Rico which differ from other regions." AF Vol. 6, at 2611. The A/E subsequently recommended termination based on Menendez's conclusion that the Contractor was in breach of the asbestos abatement specifications of the contract. Tr. 246-48.

114. As set forth in Findings 77 and 88 *supra*, Robert Lusa testified that no ACM work had taken place as of November 9, the date of the Cease and Desist Order, Tr. 680-81; Tr. 790-9, or as of the time he forwarded the asbestos abatement



submittals on December 16, 1999. He asserted that Appellant, “had not removed any asbestos from containing material from any building. Tr. 702-03; Tr. 707. He testified further that since no ACM was removed, the debris was put in a regular dumpster. Tr. 707-08. He further testified that no asbestos work was performed before the permits were received, Tr. 708, “no work whatsoever was done after the Cease and Desist Order,” Tr. 710-11, and no asbestos work had been done as of December 23, 1999. Tr. 714. Tr. 733. While Robert Lusa acknowledged that his testimony was not based on direct observations but rather on conversations with Bruce Lusa, Tr. 781; Tr. 792-93, he did represent that after the Cease and Desist Order issued he personally confirmed that there was no flashing at all on the roof of 759A. Tr. 796-97.

115. Following the meeting on January 28, 2000, Robert Lusa , by fax dated January 31, 2000, requested “authorization to repack the ACM in the dumpster.” AF Vol. 3, at 1450.

### **Termination for Default**

116. On February 7, 2000, the Contracting Officer terminated Lusa & Sons for default, pursuant to FAR 52,249-10(a) stating:

After a thorough review of your contract and discussions with Beato and Associates, the A/E overseeing the project, and DMJM/HTB, the Department of Labor’s Engineering Support Contractor, I have determined that Lusa & Sons Sheetmetal, Inc. (L&S) is responsible for its failure to perform on this project....

This termination is based on L&S’s inability to perform the project in a timely and responsible manner. Also, L&S violated the Cease and Desist Order regarding the handling and removal of asbestos-containing materials without the required permits and approved submittals. AF Vol. 3, Tab 38, pgs 1439-40.

117. On February 10, 2000, Menendez notified the A/E that a dumpster identified as containing ACM debris had been picked up for disposal at a landfill.

AF Vol. 3, Tab 36. Subsequent efforts to locate the contaminated material were unsuccessful. AF Vol. 3, Tabs 20, 22, 29, 32, 33, 34 and 35. The next day, Menendez observed that the Owner and others had attempted "... to force Lusa, Inc. to rectify the situation [presence of containers at the jobsite suspected to contain ACM], that the owner is pursuing immediate actions to resolve the situation." AF Vol. 3, Tab 28.

118. Lusa & Sons requested reconsideration of the termination order on February 14, 2000, AF Vol. 3, Tab 27, on grounds that:

Immediately upon receipt of the foregoing award, Lusa mobilized its efforts to complete the work. Lusa's original intent was to secure approval of submittals, order materials, deliver the job site, mobilize its workforce on site, and complete the work. Difficulties however were encountered with regard to certain environmental compliance issues which have now resulted in the present termination. Id. at 1423.

119. Robert Lusa testified that EQB became difficult to deal with, and suggested EQB may have been misinformed that Appellant was improperly handling asbestos. Tr. 715-16. The record is clear, however, that EQB advised Robert Lusa, shortly after the pre-construction meeting, during a telephone call he initiated, that EQB expected him to submit a plan to it, Tr. 645, and there is no evidence that he did so prior to the entry of the Cease and Desist Order.

120. A number of additional factors were cited by Lusa as contributing to the delay Appellant experienced, including:

Delays in the original submittal process;  
Delays in payment;  
Delays in response to change order requests;  
Delays in the permitting process; and  
Impossibility and/or impracticability of performance.

The request for reconsideration concluded:

Without belaboring each of the above points, it is Lusa's belief that it experienced repeated delays during the course of performance which were beyond its control and not the result of its fault and/or negligence. Id. The letter also stated: "As matters presently stand it is Lusa's belief that its submittals are ready for approval and that it has already secured the appropriate permits for completion of remaining work." Id. at 1424.

121. Reconsideration of the termination decision was ultimately denied by the Contracting Officer. AF Vol.3, Tab 27, pg. 1422

122. On February 17, 2000, the Donegan and Menendez conducted a site visit at the RJCC. AF Vol. 6 at 2674-75. Donegan reported that there was loosely bagged ACM in a sealed, but unlocked, dumpster at Building 702. Id. AF Vol 6 at 2694, Photo 25. Menendez subsequently notified the A/E that remediation was required for ACM debris generated at Building 759A and Building 702. AF Vol 3, Tab 23. Based on the recommendation by Menendez, on February 18, 2000, the Contracting Officer issued a Change Directive to the A/E, which ordered the A/E to procure a certified asbestos abatement contractor who would dispose of the ACM debris in two containers at Building 702. AF Vol. 3, Tab 21.

123. On February 22, 2000, Robert Lusa wrote to the Contracting Officer:

In an effort to demonstrate our good faith and the lengths we have gone to meet the needs of the Department of Labor, I have a copy of the appropriate

permit and I will be mailing a copy of the proposed submittals which we intend on providing to Beato & Associates [the A/E] for immediate review upon your direction. By copy of this letter I am providing Beato & Associates a duplicate copy of this letter as well as the attached submittals — not for purposes of approval — but rather to demonstrate the good faith of this firm and our efforts to meet the needs and requirements of the Department of Labor. (Emphasis in original) AF Vol. 3,

Tab 17.

124. On February 23, 2000, Menendez, met with Bruce Lusa, Acevedo, and representatives of BFI Waste Systems, the firm that had removed ACM debris from the RJCC job site on February 10, 2000. AF Volume 3, Tabs 15, 16 and 19. The meeting primarily addressed the storage and disposal of construction debris generated at Buildings 702 and 759A.

125. Appellant proposed a finding that Menendez's conclusion that the dumpsters contained ACM "...ultimately proved to be false." *See*, Appellant's Proposed Finding of Fact 62, *citing* AF Vol. 3, Tabs 15 and 16, pgs. 1405, 1406. The proposed finding is not supported by the evidence cited. The two documents Appellant cited were prepared by Menendez on February 24, 2000, following a meeting with representatives of BFI and Appellant regarding the removal and disposal of the contents of the dumpsters. The reports note that Lusa & Son representatives denied any knowledge of ACM in the dumpsters, which Menendez described as a "misrepresentation," and BFI considered it unlikely that the actual disposal site could be determined because several days of over-dumping probably buried it under tons of household garbage, rendering an "investigation" unlikely to confirm ACM disposal.

126. While the "gravel tested non-ACM," BFI had not actually inspected the dump site or tested other waste material. In contrast, Menendez personally observed Bruce Lusa working at the dumpster and packaging ACM. AF Vol. 3, Tabs 15 and 16, pgs. 1405, 1406; Tr. 307-09. His testimony, moreover, is corroborated by Robert Lusa's express request for authorization to re-package the waste ACM, (AF Vol. 3, pg. 1450.), and Dushayne's testimony that he "saw indications" of ACM removal including felt from Building 702. Tr. 445-46; Tr. 480-81.

127. On February 29, 2000, Lusa wrote to the Contracting Officer to confirm that there was an EQB permit in place which provided for the removal of 80 cubic yards of ACM and that "the submittal register" had been provided to the Contracting Officer and the A/E. AF Vol. 3, Tab 11.

128. On March 2, 2000, Robert Lusa, Acevedo, and Menendez met to discuss Appellant's revised asbestos submittal. AF Vol. 6 pgs. 2677-2680.

Menendez's report of that meeting included the following:

Initially, copies of revised submittal was provided, however, following the major discrepancies noted shortly into the meeting Mr. Robert Lusa indicated the package was only for immediate review and discrepancies noted during the meeting would be corrected and re-submitted. The undersigned advised Mr. Lusa that a brief/cursory overview of the discrepancies noted couldn't be used as a justification by LUSA for complete approval of the submittal or recourse by LUSA that this firm failed to identify discrepancies which may exist following a complete review of the submittal. LUSA was advised [Mr. Menendez] required at least one day to properly review the document.

As noted, the submittal contains major discrepancies and Mr. Robert Lusa and Mr. Jose Acevedo indicated they had not properly reviewed the current document. Id. at 2679.

129. Lusa wrote to the Contracting Officer on March 7, 2000, challenging Menendez's concerns expressed at the March 2, 2000 meeting as, "demands which have been unilaterally imposed in conjunction with this contract." AF Vol. 3, Tab 9 pg. 1394. It also questioned the application of OSHA standards to Puerto Rico, but advised that the standards would be satisfied. Id. See also, AF Vol. 2 and Vol. 3, Tab 8.

130. On March 10, 2000, the Contracting Officer responded to the request for reconsideration:

I have received the documentation which you have provided to [Mr. Menendez], regarding the completion of the re-roofing project at the Ramey [JCC]. After careful review of that documentation as well as the representations made by your counsel, Mr. Childs, and

yourself, and the analysis provided by Angel Menendez, I have concluded that the facts do not warrant reconsideration of [RFLS's] Termination for Default. AF Vol. 1, Tab 3.

131. At the time of termination, Appellant had not been paid for work completed and approved for payment, and the Contracting Officer had not issued Modifications to the contract.

### **Work Delays**

132. As mentioned in Finding 51, *supra*, Appellant adduced the testimony of Charles Truett relating to scheduling delays encountered in the course of performance. Truett, a registered engineer, retired from the Army Corp of Engineers after a twenty-seven year career. Tr. 523. For most of that time, Truett was the Chief of the Contract Administration Branch of the Savannah District with responsibility for military construction projects in Georgia, South Carolina, and North Carolina. Tr. 523-24. Following his retirement from the Corp, Truett worked for two engineering firms in Savannah, and eventually founded his own engineering firm, CFT, Inc., which provides contractor support services designed to resolve problems before they ripen into disputes. Tr. 526-28.

133. Based upon a “fairly limited review” of documents, Truett performed a time analysis of Appellant’s performance. Tr. 530. App Ex. 3. Working with the Contractor’s original progress schedule submittal, Tr. 531; App Ex 3, (black lines), he prepared a color-coded flow sheet which purports to show the components which affected job performance over time. Tr. 533.

134. Several factors affected completion of the project and each, according to Truett, was attributable to the Contracting Officer or his representatives. Initially, Truett noted that the job was 154 days in duration. The Contractor forwarded its materials submittals between July 28 and August 2. Tr. 534. The planned starting date was September 6. Tr. 535. The materials submittals should have been “marked with Action” by the A/E within two weeks, *See*, AF Vol. 5, ¶ 1.5.A. at 2474-74A; Tr. 58, but were not approved in writing until December 8. Tr. 534.

135. Truett attributes a direct delay of a thirty-eight days to Contracting Officer’s failure to approve the materials submittals, Tr. 534-535; App Ex. 3

(yellow line on flow sheet), and that delay was, Truett reasoned, mitigated by the Contractor because it went ahead and ordered materials without written approval of the materials submittals. Tr. 536.

136. Contrary to Truett's analysis, the record shows that the government's delay in returning written approvals for Appellant's materials submittals did not actually delay the ordering of materials by the Contractor. *See*, Findings 48; 50-51, *supra*.

137. Truett's flow chart next showed that during the period from October 14 to November 1, actual work was performed on the buildings, and this, accordingly, is an "unimpacted term." Tr. 537. Thereafter, contract performance was delayed for twenty-four calendar days, from November 1 to November 24, during which four problems allegedly encountered by the contractor called for extra work requiring change orders. App Ex.3 (orange line). Tr. 542; Tr. 538.<sup>3</sup> The period Truett attributes to change order delays, further overlaps, by fifteen days, (App Ex. 3 (blue line)), a delay attributed to the Cease and Desist Order, directing the Contractor not to perform the asbestos work issued by the Contracting Officer on November 7, 1999, and extending to February 7, 2000, the termination date. (App. Ex. 3 (pink line)). Truett noted that the cease and desist order imposed an absolute delay because "asbestos work was key to the completion of the contract. It was part of the original contract." Tr. 539-41; Tr. 561. All of these delays, including the concurrent delays caused by the overlap of the change order and the cease and desist order, were, in Truett's opinion, attributable solely to the actions and inactions of the Contracting Officer. Tr. 542.

138. Lastly, Truett opined that EQB permits were not required under the contract (Tr. 584), but noted, for purpose of his analysis, that he did not attribute a specific period of delay to problems associated with the contractor's EQB permits. Tr. 543; Tr. 566-57. In summary, in Truett's opinion, on a 154-day contract, a net delay in contract performance of 136 calendar days is directly attributable to the Contracting Officer; 38 days for submittals, 24 days for change orders, 89 days for the cease and desist order, less 15 days of concurrent delays. Tr. 544. App. Ex. 3

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<sup>3</sup> The parties dispute whether problems other than those relating to wood nailer were actually communicated to the A/E, Tr. 50-52; 128-135. , but for purposes of his analysis, Truett opined that his change order delay analysis would not be affected even if problem relating to the rotten wooden nailer were the only problem communicated to the A/E. Tr. 580-81.

(black and red cloud at far right on the flow chart). Considering the foregoing periods of delay, Truett opined that, “In this particular case, I don’t see any contractor elements of delay....” Tr. 546.

139. The record shows that Truett’s analysis was predicated upon his understanding that no permits were needed to perform the asbestos work on this job. Tr. 584. His delay analysis was further based upon his understanding that no ACM abatement had been performed on the project as of the time the Cease and Desist Order issued. Tr. 556; Tr. 565; Tr. 602. He noted that, according to the Contractor’s original schedule, ACM removal was scheduled to commence on September 6, 1999, and take about four weeks, Tr. 559; Tr. 563; Tr. 566, but he was aware of no effort by the Contractor prior to September 6, 1999, to obtain approval for ACM abatement work. Tr. 561-62. He testified, however, that abatement work, in any event, would not start on a roof until replacement materials were on site. Tr. 564.

## DISCUSSION

A termination for default is the government’s remedy of last resort for dealing with a contractor’s unexcused failure to perform under a contract. It is recognized as an especially harsh action which should be imposed by a Contracting Officer and sustained by the Board only upon a showing of good grounds and on solid evidence. J. D. Hardin Construction Co. v. U.S., 390 F.2d 702 (Ct. Cl. 1968); Mid-America Painters, Inc., ENG BCA, 91-1 BCA ¶ 23,367. The government bears the burden of establishing the propriety of a default termination, and it is strictly accountable for invoking it as a sanction. Clay Bernard Sys. Int’l, Ltd. v. U.S., 22 Cl. Ct. 804 (1991); Lisbon Contractors, Inc. v. U.S., 828 F.2d 759 (Fed. Cir. 1987). In general, the remedy is available, *inter alia*, when a contractor fails timely to complete contract work, endangers timely completion by failing to progress in the work, or breaches other contract provisions.<sup>4</sup>

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<sup>4</sup> In addition to lack of progress, default terminations have been imposed for disruptive behavior, Arthur Napier, PSBCA 94-2 BCA ¶ 26,695; sexual harassment, Thomas A. Grafford, PSBCA, 2000-2 BCA ¶ 31,069; failure to establish effective management and accounting controls, Pacrim Pizza Co., ASBCA, 2000-1 BCA ¶ 30,928; record keeping failure and failure to submit data reports, International Hair, ASBCA, 2001 -1 BCA ¶ 393; Cellular 101, INC., 2000-1 BCA ¶ 30,582; failure to submit invoices, Johnson Management Group, Inc., ASBCA, 2000-2 BCA ¶ 31,116; failure to obtain driver’s license or unsafe operation of motor. Maywood Cab Service, Inc., VABCA, 77-2 BCA ¶ 12,751. It has also been observed that, “failure to comply with important reporting standards,(i.e. related to hazardous waste) even when those standards are not related to contract performance, may justify a default termination.” Environmental Data Consultants, Inc., GSBCE, 96-2 BCA ¶ 28,614, *citing* Kelso v. Kirk Brothers Mechanical Contractors, Inc., 16 F.3d 1173 (Fed. Cir. 1994).



In this instance, the record shows that the period between the Notice to Proceed and the Substantial Completion Date was 154 days in duration, with a planned starting date of September 6, 1999. The Notice to Proceed issued on July 12, 1999, and, accordingly, the substantial completion date was December 13, 1999. The record shows, however, that approximately 65% of the work remained unfinished on the substantial completion date. Roof demolition and ACM abatement work was still needed and only temporary coverings had been installed. Clearly the roofs were not capable of being used as intended on the substantial completion date. Dimarco Corp., ASBCA, 85-2 BCA ¶ 18,002. Indeed, with no time left, a meager 45% of the work done, and asbestos submittals still not proffered, the Contracting Officer had ample reasons to conclude that Appellant was in default on December 13, 1999. Highland Construction Corp., GSBCA, 68-1 BCA ¶ 6966; Edward S. Good, Jr., ASBCA, 66-1 BCA ¶ 5362.

### **Excuses for Default**

Once the government establishes that sufficient grounds exist to warrant a default termination, the burden shifts to the contractor to demonstrate that the default was excused by circumstances beyond its control and without its fault or negligence. Switlik Parachute Company, Inc., v. U.S., (Ct. Cl. 1978); Munson Hammerhead Boats, Inc., ASBCA, 2000-2 BCA ¶31,143; FDL Technologies, Inc., ASBCA, 93-1 BCA ¶ 25,518; Epact Corp., GSBCA, 73-2 BCA ¶ 10,329.

In this instance, Appellant cites a host of delay-causing factors for which it eschews any responsibility. Delays in performance, it argues, were attributable to contract ambiguities and defective specifications, mismanagement and delays in payments and approvals by the Contracting Officer, the wrongful issuance of a Cease and Desist Order, improper permitting requirements, and bad faith by those who were administering the contract. Its expert, Charles Truett, for example, lays total blame for the default on the doorstep of Contracting Officer, and concludes that Appellant was entirely without fault when the substantial completion date passed and the contract was nowhere near substantial completion. In his opinion, on a 154-day contract, a net delay in contract performance of 136 calendar days is directly attributable to the Contracting Officer; 38 days for submittal approvals, 24 days for change orders, and 89 days for the cease and desist order, less 15 days of concurrent delays.

The Board has carefully reviewed each of Appellant's excuses, and for the

reasons set forth below, finds each lacking in merit. We turn first to the contention that contract ambiguities and defective specifications caused the Contractor to delay in preparing and forwarding asbestos abatement-related submittals and permits.

### **Contract Ambiguities**

Appellant asserts that the contract contains ambiguous provisions among its various specifications which relate to the Contractor's obligations to prepare and submit asbestos abatement plans and permits. Critical of the drafting process, it notes that the specification package was prepared by different groups, including Beato and Associates, Angel Menendez Environmental Services, Inc., DMJM, and the Contracting Officer's contract administration staff. Testimony further disclosed that Menendez prepared the asbestos abatement specifications without considering other sections of the contract, and neither the A/E nor DMJM edited Menendez's work in the context of the contract as a whole before presenting it to the Contracting Officer. As a consequence, Appellant asserts that ambiguities survived the drafting process and were adopted by the Contracting Officer causing substantial delays which excuse the default.

Specifically, Appellant emphasized at the hearing and in its post-hearing brief that Paragraph 1.5.C of Section 01546 provided for the submission of a hazardous materials plan only if the parties agreed in writing at the pre-construction Safety Meeting, and no such agreement was executed at that meeting. Consequently, Appellant believes the contract should be construed as requiring no hazardous materials plan since asbestos is such a material, but no agreement to prepare such aplan was executed at the pre-construction meeting. Thus, Section 01546, in Appellant's view, conflicts with Section 01301, which identified a number of required submittals, and included an asbestos abatement submittals checklist "required from the Contractor" before the start of abatement work, and Sections 01013 and 02086 which required the Contractor to prepare and submit for approval asbestos submittals including Asbestos Hazard Abatement Plans, [AHAP].

In addition, Appellant notes that Section 01013 requires the "owner's Certified Industrial Hygienist" to prepare and submit an AHAP while simultaneously requiring the Contractor to prepare an AHAP. Testimony of the drafter of this provision, Menendez, revealed that the requirement in Section 01013 that the "owner's Industrial Hygienist" prepare an AHAP was a typographical error.

The requirement, he observed, should have been imposed upon the Contractor. Under such circumstances, Appellant argues that the Order of Precedence Clause as well as the Options Clause afforded the Contractor the option not to prepare hazardous materials submittals in the absence of an agreement in writing at the pre-construction meeting, and, alternatively, the ambiguity about who would prepare such submittals, assuming they were required, would excuse Appellant's delay in producing them.

When a conflict of interpretation is presented to the Board, the meaning of the words included in a contract is derived by a two-step process. *See, Midwest Environmental Controls, Inc.*, LBCA, 98-2 BCA ¶ 30,058. The Board must determine first whether an ambiguity exists. *John C. Grimberg Co., Inc. v. United States*, 7 C. Ct. 452, 456, *aff'd*, 785 F.2d 325 (Fed. Cir. 1985). If an ambiguity is immediately apparent, it is a patent ambiguity, and the contractor must seek clarification. *George E. Newsom v. United States*, 230 Ct. Cl. 301, 303, 676 F.2d 647, 650 (1982). *U.S. v. Turner Construction Co.*, 819 F.2d 283 (Fed. Cir. 1987); *Community Heating and Plumbing v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993). If a contractor does not inquire about a clearly patent ambiguity, the ambiguity will be construed against it. *Midwest Environmental Controls, Inc.*, *supra*; *S&W Assoc.*, DOT BCA, 96-2 BCA ¶ 28, 326. Although a contractor may have some responsibility to inquire about a patent discrepancy, omission, or conflicts in the provisions, it is not normally required to seek clarification of "any and all ambiguities, doubts or possible differences in interpretation." *WPC Enterprises, Inc. v. United States*, 163 Ct. Cl. 1, 6, 323 F.2d 874, 877 (1964) (disapproved on other grounds, *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 430-31 n. 6 (1966)); *Pathman Construction Co.*, ASBCA, 81-1 BCA ¶ 15, 010. If the ambiguity is not patent, the ambiguity will be interpreted against the drafter of the contract, as long as the other party's interpretation is reasonable. *E.g., Perry & Wallis, Inc. v. United States*, 192 Ct. Cl. 310, 316, 427 F.2d 722, 726 (1970). The alternative interpretation, however, must be within the "zone of reasonableness." *Bishop Engineering Co. v. U.S.*, 180 Ct. Cl. 411 (1967); *WPC Enterprises, Inc.*, 163 Ct. Cl. At 6; *Emerald Maintenance, Inc.*, 94-1 BCA ¶ 26,481. Our objective is to "give effect to the intent of the parties and the spirit and purpose of the agreement." *ITT Arctic Services, Inc. v. U.S.*, 207 Ct. Cl. 743, 751-52 (1975); *Algiers Iron Works & Dry Dock*, DOT BCA, 96-1 BCA ¶ 28,032. Guided by these principles, we conclude that appellant's arguments are without merit.

The contract before us contains three separate provisions which require the submission of an AHAP. Section 02086, paragraph 1.3.9 requires an AHAP, and Section 01013 contains two requirements for the submittal of an AHAP, one by the Contractor and one by the owner's industrial hygienist. The reference to the "owner's Certified Industrial Hygienist," in the second AHAP requirement in Section 01013 was, we now know, a typographical error. Indeed, the project manager, unaware that the reference to owner's industrial hygienist was an error, was unclear why the owner's AHAP had not been prepared. Obviously, the defect was latent, and accordingly, as drafted, Appellant had no duty to comply with the second AHAP requirement relating to the owner's industrial hygienist in Section 01013. Moreover, in view of its latency of this defect, the Contractor had no duty to seek clarification.

Yet, the error in one AHAP requirement imposed by Section 01013 did not render ambiguous the other requirement in that section. Whether or not the owner's industrial hygienist prepared and submitted an AHAP, Section 01013 unambiguously required Appellant to submit for approval an AHAP which it prepared. Thus, unlike the situation in Cryenco, Inc., ASBCA 72 BCA ¶ 9718, the error here did not impose improper restrictions on the Contractor's performance or relieve the Contractor of the obligation to prepare and submit an AHAP independent of the owner's failure to prepare a second AHAP. Construed as drafted, the two AHAPs in Section 01013 were neither inconsistent, interdependent, nor mutually exclusive.

Appellant argues further, however, that Paragraph 1.5.C of Section 01546 required a written agreement at the pre-construction meeting before the submittal requirements in the asbestos abatement technical specifications 01013, 01301, 02086, Paragraph 1.3.9, were triggered. The spirit and purpose of the contract and the intent of the parties as reflected in the contract as a whole suggest otherwise.

Its post-termination litigation arguments to the contrary notwithstanding, Appellant understood that the ACM abatement specifications were integral to the roofing contract as a whole. Section 02086, in its Summary at ¶ 1.2, thus advised the Contractor of the government's concern about the release of airborne asbestos fibers during demolition and removal, and the express requirements under Sections 02086, 01013, and 01301 that the owner's representative approve the Contractor's asbestos abatement submittals before any abatement work commenced.

Thus, the notion that “general” Specification 01546, Section 1.5, should be construed as limiting the obligation to file any abatement submittals under the contract unless the parties so agreed at the July 14, 1999, pre-construction meeting is not compatible with the language or purpose of the contract considered as a whole, and was not an interpretation which guided the performance actions of the parties. The specific asbestos abatement submittal requirements in Specifications 01013 specifically identified the location of ACM on the roofs of both buildings and Specifications 01301, and 02086 set forth the Contractor’s submittal requirements in dealing with known ACM at the job site. The general requirements of Specification 01546 were applicable to asbestos and other hazardous material exposure situations that might be encountered but were not designated in the asbestos abatement specifications. Appellant, moreover, labored under no misunderstanding of either the limits of the general hazardous materials specification or its obligations under the asbestos abatement specifications dealing with ACM identified in the old roofs it contracted to replace.

While the absence of a separate written agreement to prepare a hazardous material submittal under Section 01546 was proffered at the hearing as an excuse for the delay in preparing and filing the asbestos submittals, contemporaneous documents indicate that Appellant knew it needed to prepare and provide asbestos submittals before it started any of the asbestos abatement work. Indeed, prior to testimony at the hearing, Appellant never suggested that the absence of a written agreement to prepare hazardous materials submittals at the pre-construction meeting relieved it of any responsibility to prepare such submittals and transmit them to the A/E for approval in accordance with Sections 01013, 01301, 02086 of the contract. Nor did it suggest in its communications with the Contracting Officer that it believed asbestos submittals were not required under the contract, and this is significant. When the Board interprets a contract, “great weight is given to the parties’ understanding as demonstrated by their conduct before the controversy arose.” DTM Construction Corp., VABCA, 99-1 BCA ¶ 30,306; Julius Goldman’s Egg City v. U.S., 697 F.2d 1051 (Fed. Cir. 1982), *cert.denied*, 464 U.S. 814 (1983); Macke Co. v. U.S., 199 Ct. Cl. 552 (1972).

Indeed, Robert Lusa conceded that he understood the asbestos submittals requirements of the contract. He testified that as of October 17 or 18, 1999 Appellant had done “nothing” with respect to the approval of its asbestos

submittals, not because it believed submittals were unnecessary, but as a consequence of its decision to wait until it had arrived on site in Puerto Rico before it drafted them. Thereafter, Lusa testified that Appellant did not commence the removal of the roofing felt on building 702 because it had not submitted and received approval of the submittal for the performance of the asbestos abatement work. Eventually, Appellant turned in an AHAP “per Section 02086” three days after the substantial completion date, but the record is clear that the timing of this submission had nothing to do any ambiguity that such a submittal was required.

Moreover, contrary to Appellant’s assertion at the hearing that the asbestos abatement provisions were impracticable without the guidance and services of specially skilled subcontractors, its expert, Dushayne, agreed that the specifications were workable, and Menendez specifically offered to provide assistance even as Appellant commenced the removal of asbestos despite his advice. The record as a whole demonstrates that the Contractor understood the contract requirements but failed adequately to prepare for performance. We conclude that responsibility for the delay in preparing and providing the asbestos submittals for approval rests solely with the Contractor, and, accordingly, Appellant has failed to demonstrate that defects or ambiguities in the contract specifications contributed to its default. *See, FJW Optical Systems, Inc.*, ASBCA, 87-2 BCA ¶ 19,905.

### **Government Delays in Approval of Materials Submittals and Payment Request**

Between July 27, 1999, and August 2, 1999, Appellant forwarded four sets of submittals for approval by the A/E. These submittals covered the Schedule of Values, roofing components and materials, and the Contract Progress Schedule which provided that the demolition, ACM abatement, and installation of the temporary roof would commence on September 6, 1999. According to Section 01300, paragraph 1.5.A. these submittals should have been reviewed and “marked with Action” where possible within two weeks, but at least within a reasonable time. We conclude, however, that the delay in returning written approval of the materials submittals neither impacted Appellant’s progress schedule nor implicated the government in Appellant’s default. Accordingly, it does not excuse the default or warrant an extension in the substantial completion date. *Laumann Manufacturing Corp.*, ASBCA, 2001-2 BCA ¶ 31,517; *Professional Office Products*, ASBCA, 94-3 BCA ¶ 27,201.

Appellant contends that approval of materials submittals was a condition precedent to performance of the work on the contract, that “practically speaking, no work could commence until such material submittals had been approved,” and that written notice of approval was not forwarded to Appellant prior to December 8, 1999. Continuing, it argues that the submittals were not returned to Appellant until the site meeting on December 8, 1999, and Charles Truett opined that a 38-day delay in the start date was due to the government’s failure timely to return the written approvals. Appellant acknowledges that architect Fred Muhlach, acting on behalf of the A/E, verbally approved submittals 2, 3, and 4 on August 29, 1999, and verbally approved submittal number 1 on September 9, 1999, but it argues that the record contains no evidence of a delegation of authority by the Contracting Officer to Muhlach.

The record shows that Appellant ordered materials on October 7, 1999, sought payment for the purchase of those materials, and received delivery of the materials on or about October 14 through 18, 1999. Truett observed that it is generally not advisable for a contractor to proceed without written approval of its materials submittals, but this Contractor did, and it received the materials a week later. In his opinion, the government’s delay in approving the materials submittals delayed delivery of materials to the job site and prevented work from commencing on the planned starting date of September 6. Although ACM removal was scheduled to commence on September 6, 1999, and take about four weeks, and although Truett was aware of no effort by the Contractor prior to September 6, 1999, to obtain approval for ACM abatement submittals, he testified that abatement work, in any event, would not start on a roof until replacement materials were on site. Thus, Truett reasoned that a direct delay of 38 days may be attributable government’s delay in approving the materials submittals, which he believes delayed the ordering and delivery of materials, and this, he opined, was mitigated by the Contractor who proceeded to order materials without written approval. The Board has carefully evaluated the alleged impact attributable to the delay in returning written approval of the Contractor’s materials submittals. We conclude that the Contracting Officer was not responsible for a 38-day delay in the start of work.

D’Navarte essentially confirmed Appellant’s assertion that return of the written approvals was delayed, but he offered an additional perspective: “We asked if he wanted us to send them back the approvals, which he answered that we can retain them until he arrives in Puerto Rico, so we can deliver them to him in the first

construction meeting.” Robert Lusa’s recollection of the conversation as recounted in his January 24, 2000 letter to the Contracting Officer similarly reported that on September 9, 1999; “D’Narvarte asked me if I wanted them sent back through the mail or could he give them to my superintendent (Bruce Lusa). I told him to please give them to our employee on the job site.” That meeting was then scheduled for October 28.

Contrary to Truett’s understanding that Appellant appropriately delayed the start date while waiting a reasonable time to get written confirmation of the verbal approval, the record shows that Appellant agreed to proceed on the basis of the verbal approvals. Under these circumstances, even if we assume that the return of the written approvals was delayed notwithstanding Appellant’s agreement that the A/E should not mail them, it is otherwise apparent that the absence of written approval of the materials submittals had no actual impact on Appellant’s plan of action. The contractor was not required to wait for the written approval and, in fact, elected not to wait. *Compare, Southwest Marine, Inc., DOT BCA 96-1 BCA ¶ 27,985.* The materials were purchased and sent to the job site as planned when the job was bid, and according to Robert Lusa, as recounted in his January 24, 2000, letter, the purchase and mobilization processes “went according to plan” and the “materials and equipment made it Puerto Rico in a timely fashion.” AF Vol. 6, pg. 2595. The alleged government delay obviously did not hinder Appellant’s performance or cause Appellant’s delay in ordering supplies or mobilizing at the work site, and did not discharge Appellant’s obligation to timely complete the work. *Malone v. U.S., 849 F. 2d 1441 (Fed. Cir. 1988); See, Arcus Corp., Inc., ASBCA, 2002-1 BCA ¶ 31,671. Umpqua Marine Ways, Inc., ASBCA, 91-2 BCA ¶ 25,525.*

To be sure, Lusa testified at the hearing that he expected the return of written approvals within a few days of the verbal approvals and was delayed when he did not receive them, but his testimony is contradicted by his own correspondence, and accordingly lacks credibility. The Contracting Officer’s delay in returning written approval of Appellant’s materials submittals was not only requested by the Contractor, but had no actual impact on Appellant’s mobilization plans or the timing of its decision to purchase materials. Consequently, the delay allegedly due the Contracting Officer’s failure to approve the materials submittal was, as the record demonstrates, actually due to the Contractor’s failure timely to prepare for performance of the contract. A default termination, under such circumstances, is not



inappropriate. *See, FJW Optical Systems, Inc.*, ASBCA, 87-2 BCA ¶ 19,905. *Malone v. U.S.*, *supra*; *Arcus Corp., Inc.*, *supra*; *Laumann Manufacturing Corp.*, *supra*; *Professional Office Products*, *supra*; *Umpqua Marine Ways, Inc.*, ASBCA, 91-2 BCA ¶ 25,525; *Alpha Matrix, Inc.*, ASBCA, 94-1 BCA ¶ 26,514.

Nor did the delay in payment of the invoice for materials delivered to the job site contribute to the default. The record shows that Appellant, on October 13, 1999, submitted a request for payment in the amount of \$159,480.00, including \$39,480 for mobilization and administrative costs, and \$120,000 in roofing materials. The record further shows that Appellant's invoice was not paid until late February or early March of 2000, after the termination for default. Truett testified that the delay in payment hurt Appellant's cash flow, and possibly made it more difficult to continue performance, but he did not identify it as a specific cause of Appellant's delay which led to the default.

Nevertheless, while the delayed payment was a source of irritation for the Contractor, the evidence does not suggest that it actually impacted its ability to perform. In his January 24, 2000, letter to the Contracting Officer, Robert Lusa expressed his frustration in attempting to secure the payment for the materials delivered, but there is no indication that the delay payment impeded Appellant's ability to perform, and it does not excuse the default. *See, Sancelmar Industries, Inc.* ASBCA, 74-1 BCA ¶ 10,391; *Pruett Manufacturing Co.*, ASBCA, 87-1 BCA ¶ 19,378..

To the contrary, Lusa made it clear that:

When this job was bid my original game plan was to get all our submittals approved, order the materials here in Florida, have them delivered to the packing company in Tampa, Florida, then ship them to Jacksonville, Florida where they would be shipped to Puerto Rico. All of this took time to prepare and coordinate. Fortunately, this process went according to plan and the materials and equipment made it to Puerto Rico in a timely fashion. AF Vol. 6, pg. 2595.

Contrary to Truett's analysis, the record as a whole demonstrates that the

scheduled starting date of September 6, 1999, was not delayed 38 days due to flaws in the administration of this contract by the Contracting Officer or any alleged improper delegations of authority. The start date was delayed because it took Appellant “time to prepare and coordinate” the purchase and delivery of materials and equipment in accordance with the process it formulated and which proceeded “according to plan.” Indeed, in the contractor’s view, the materials and equipment arrived on the job site “in a timely fashion,” notwithstanding the fact that they arrived 38 days after the scheduled start date. It thus appears that the 38 delay in the start of the work is directly attributable to the Contractor’s failure adequately to prepare to begin work on the scheduled start date, and its contemporaneous perception that its delayed arrival at the work site was nevertheless “timely.” The Contractor commenced work on a date of its own choosing, and can not now persuasively blame its tardy start on the Contracting Officer. *See, FJW Optical Systems, Inc.*, ASBCA, 87-2 BCA ¶ 19,905.

### **Delays in Obtaining Permits From EQB**

Appellant also contended for the first time at the hearing that it was not required under Puerto Rican law to obtain an EQB demolition permit prior to commencing abatement work, and the contract itself did not require Appellant to obtain any permits which were not required by local authorities. Consequently, Appellant contends that the Contracting Officer imposed overly restrictive and unnecessary requirements by insisting that Appellant obtain local asbestos abatement permits and improperly accused Appellant of violating local laws when he issued the Cease and Desist order.

Brian Dushayne, Appellant’s asbestos consultant, developed an elaborate analysis of federal asbestos regulations implemented in Puerto Rico by its EQB which, he opined, follows the National Emissions Standards for Hazardous Air Pollution (NESHAP). Under federal standards, Dushayne explained, it is first necessary to distinguish between friable and non-friable asbestos, and if friable, then ascertain the quantity of regulated ACM (RACM). He noted that when roofing demolition does not involve sanding, grinding, abrading, or blunt edge cutting by machine, it remains category 1 non-friable under NESHAP, and, in his opinion, Puerto Rico did not require permitting for the demolition portion of the contract work because it did not generate trigger quantities of RACM. In his view, a permit for disposal of asbestos under Rule 1005 may have been required, but Dushayne

noted that work had stopped pursuant to the Cease and Desist Order before the disposal phase of the project had been reached. Thus, Dushayne opined that the debris removed was non-friable category 1 material that Appellant was not required to bag under OSHA or NESHAP, and in Puerto Rico, only had to bag for disposal not storage.

Commonwealth of Puerto Rico Act No. 9 of June 18, 1970, establishes an environmental public policy for the Commonwealth and created the Environmental Quality Board (EQB). (See, Title II of the Puerto Rico Environmental Public Policy Act (Law No. 9 of June 18, 1970, as amended). The EQB was empowered, *inter alia*, to adopt rules and regulations to establish a system of permits and licenses designed to administer the Federal Clean Water Act, the Federal Clean Air Act, and other Acts, and establish local standards that regulate the pollution controls for air, water, solid waste, and noise. EQB implemented its authority by promulgating Regulations for the Control of Atmospheric Pollution, and non-hazardous solid waste management. As a general rule, regulation of air pollution and waste disposal is implemented through an EQB permit program, and these programs were specifically referenced in Contract Specification 02086, Paragraph 1.3.7.

Dushayne and Menendez differed in their interpretations of Rule 422. In Dushayne's opinion, the definition of ACM under EQB Rule 422, as a measure implementing NESHAP, should be construed as adopting the NESHAP trigger quantity of one percent regulated ACM (RACM) which does not include category one non-friable ACM. As such, in Dushayne's view, quantities of Non-RACM or RACM below the trigger quantities may be "managed" without an operational permit. Menendez construes the Rule as implementing NESHAP with a permissible but more stringent local standard applicable to the handling of all ACM that meets the trigger quantity. In addition, Menendez explained that EQB requirements for worker protection do not distinguish between friable and non-friable asbestos.

At the local level, asbestos is currently regulated by the EQB as an air pollutant under the EQB Regulations for the Control of Atmospheric Pollution, and is, therefore, subject to the air emission permit requirement. Among the regulations dealing with air pollution, Rule 422, Asbestos Containing Material Management, Paragraph (A) of that Rule provides: "No person shall cause or permit the management of asbestos-containing material as defined in these regulation[s] without obtaining an operational permit approval from the [EQB]..." and govern the

removal, demolition, enclosure, encapsulation, and repair of asbestos-containing materials. Air Regulation, Part IV -- Rule 422.

EQB Rule 102, Definitions, states “Asbestos-containing material (ACM) [m]eans any material or product which contains more than 1 percent of asbestos (by weight).” EQB did not distinguish between friable and non-friable asbestos in its definition of ACM. By definition, then, the “management of ACM,” under Rule 422, required an operational permit for “any material ... which contains more than 1% of asbestos (by weight)” which included the ACM on both buildings at the RJCC. Rule 422 is broader in its coverage than NESHAP asbestos standards, *See*, 40 CFR §61.40 (July 1, 1995), but entirely consistent with the federal standards.

Nor did it come as any surprise to the Contractor that a demolition permit was needed before it could commence the asbestos abatement work under the contract. Following the pre-construction meeting, Robert Lusa called the EQB and “explained the job to them and they said there’d be no problem in getting the permit,” and one of the “things they told me is I needed a plan and I needed my workers to get a refresher in Puerto Rico.” At the time, however, Appellant elected not to seek the permit immediately, but rather wait until Bruce Lusa, the project superintendent, arrived in Puerto Rico, and then apply for the permit.

While Lusa’s statement may be unclear in respect to whether he was referring to a disposal or demolition permit, later testimony clarified matters. He observed that the job was “...way behind schedule,” but they were not doing any asbestos work, “because we didn’t have our permits and we didn’t have some submittals returned.” Although Appellant argued at the hearing that a demolition permit was unnecessary, the record shows that Appellant planned to remove the roofing felt on building 702 “when we got our permits and notification and submittals.” Thus, Robert Lusa explained that “It was my intention to get the asbestos permit once my superintendent (Bruce Lusa) arrived in Puerto Rico and was setting up the job. Never at any time did I anticipate the difficulty of getting this permit without help.”

The record shows that Appellant knew it needed these permits, and neither Appellant nor its on-site local asbestos consultant, Acevedo, ever suggested to the Contracting Officer at any time prior to the termination that an operational permit was not required by EQB prior to commencement of the ACM abatement work. To the contrary, all parties, including the local asbestos consultants hired by the A/E and Appellant, respectively, were guided by the understanding that an operational

permit was required, and we conclude their understanding is consistent with the requirements of EQB Rule 422 and the contract.

Appellant complains further that EQB became difficult to deal with, and suggests EQB may have been misinformed that Appellant was improperly handling asbestos. The record is clear, however, that neither “cultural” differences nor EQB footdragging delayed the issuance of the permits. EQB advised Robert Lusa early on that Appellant needed to submit a plan to secure a permit, and Appellant apparently delayed its compliance with EQB’s advice until it hired Acevedo & Associates, in November of 1999. As a consequence, it did not receive the operational permit until December 13, 1999, which, coincidentally, was the substantial completion date.

Under these circumstances, Appellant’s failure to prepare adequately to start the work or timely file for the required permits or provide the plan EQB advised Robert Lusa it expected him to submit with his permit applications were the only factors which delayed the issuance of required permits. We, therefore, conclude, for all of the foregoing reasons, that the Contracting Officer exceeded neither the requirements of local law nor the provisions of the contract by insisting that Appellant obtain an EQB Rule 422 permit prior to abating any asbestos at the job site. Appellant was solely responsible for the delays it experienced in obtaining the necessary permit in time to satisfy contract requirements. David Snell, ASBCA, 74-1 BCA ¶ 10,547; Employer’s Security Co. Inc., GSBCA, 85 BCA ¶ 17,885. Accordingly, the problems Appellant encountered in timely obtaining its permits do not, under these circumstances, excuse its default. *See*, Aqua Clean Inc., HUD BCA, 89-3 BCA ¶ 22,030; R.S.S. Inc., GSABCA, 83 BCA ¶ 16,280; U.S. Detention, DOT BCA, 99-1 BCA ¶ 30,305.

### **Government Delays in Approving Change Orders**

Appellant contends that during the course of performance four difficulties were encountered which generated extra work and prompted it to request changes which the Government virtually ignored. The record shows that Appellant informed the A/E on November 1, 1999, that it had identified 400 linear feet of wooden nailer on Building 759A that had rotted away and required replacement. The Contracting Officer acknowledges receipt of this request, but contends that he simply did not have time to deal with the modification request given the problems encountered in

dealing with the Contractor's difficulties with the permitting and asbestos submittal requirements. Beyond that, the Contracting Officer denies receiving three other requests involving air conditioning supports on Building 759A, the electrical feed on Building 759A, and the electrical chase at Building 702, and Appellant was unable to establish that it ever submitted them.

The record shows that Lusa & Sons advised the Project Manger that it had reported to the A/E a "minor amount" of extra work apparently related to the replacement of a wooden nailer. For purposes of analyzing the alleged delays occasioned by this extra work, we find it inconsequential whether one or four change requests were pending. Truett identified a twenty-four calender day period from November 1 to November 24 during which, he believed, contract performance was adversely impacted by a change order delay attributable to extra work needed to replace a rotted wooden nailer.<sup>5</sup>

The change order delay overlaps by 15 days, a delay Truett attributed to the Cease and Desist Order which we consider below. Truett acknowledged, however, that, although he was unsure whether this extra work involved asbestos, his assessment was premised on the belief that the work was asbestos free. If the work did involve asbestos, he agreed, it could not be completed until the contract's asbestos requirements were satisfied. Under either eventuality, however, any delay in issuing the modification would not excuse the failure to comply with other provisions of the contract, and does not excuse the default. Bio-Temp Scientific, Inc., ASBCA, 95-2 BCA ¶ 27,682; Comspace Corp., DOT BCA 2002-1 BCA ¶ 31,792. Even if the wooden nailer modification had issued, Appellant still

would have been unable to finish the asbestos abatement work or the roof replacement project before the substantial completion date.

### **Delay Attributable to the Cease and Desist Order**

Appellant contends that the issuance of the Cease and Desist Order with its directions to comply with an allegedly faulty list of supposed requirements was itself a defective order which precluded any further performance by the Contractor

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<sup>5</sup> Truett opined that his change order delay analysis would not be affected even if the problem relating to the wooden nailer were the only problem communicated to the A/E.

because it effectively suspended critical path work until the date of termination. The record shows that the Contracting Officer issued the Cease and Desist Order on November 9, 1999, directing Appellant to stop all asbestos-related work at the job site until it provided required asbestos submittals and permits, complied with applicable legal requirements regarding asbestos, and complied with contract specifications regarding the safe handling, removal, and disposal of ACM. The order was based upon observations during a site visit on October 28, 1999, by the Project Manager, Menendez, and others that Appellant had removed ACM in the form of mastic on the perimeter fascia board of Building 759A and put it in a dumpster with uncontaminated material. The order remained in effect from November 7, 1999, through February 7, 2000, the termination date.

Truett opined that the Cease and Desist Order was improperly issued and imposed an absolute delay of 89 days, because “asbestos work was key to the completion of the contract. It was part of the original contract.” Tr. 539-41; Tr. 561. He acknowledged that he based his conclusion on several assumptions or beliefs, including his understanding that no asbestos abatement had taken place before the Cease and Desist Order issued. Consequently, if no asbestos abatement had been performed, he reasoned, then no asbestos submittals or permits were actually required to perform the pre-Cease and Desist Order work, and the Order should not have issued. Truett’s understanding was supported by Robert Lusa who testified under oath at the hearing that no asbestos abatement work was performed before the Cease and Desist Order issued, and, in fact, no asbestos was removed after it issued. Dushayne concluded, as previously noted, that whether or not ACM was removed, Puerto Rican law did not require a demolition permit for this job.

We have concluded that the contract required both EQB permits and approval of asbestos submittals before abatement work could proceed. We further conclude, notwithstanding Robert Lusa’s testimony to the contrary at the hearing, that Appellant’s crew commenced the abatement of asbestos as set forth in the Cease and Desist Order. The Board is mindful of Appellant’s contention that the flashing, not the fascia board, on Building 759A was identified in the contract as containing ACM; nevertheless, we find the assertion that no ACM was abated as of October 28, 1999, without merit.

Robert Lusa testified that the Contracting Officer was simply wrong when he alleged that ACM had been removed from Building 759A. Although he seemed to concede that flashing was present when he testified that 20-25% of the flashing was

missing before any work began, he eventually settled upon the notion that Building 759A actually had no flashing at all. Arguing from that premise, Appellant reasons that the absence of flashing on October 28, 1999, the date of the site visit, is not a condition which establishes that Appellant had removed it, and that later tests on the contents of the dumpster, according to Appellant, revealed that it contained no ACM from the fascia board or the other waste. In summary, according to Robert Lusa, the contract erroneously identified ACM in a flashing which did not exist on Building 759A, and the work Lusa & Sons performed, in fact, removed no ACM. While Robert Lusa conceded at the hearing that he had not personally inspected the roof perimeter of Building 759A, the Board otherwise rejects Appellant's contentions.

The contract identified 1000 square feet of flashing on Building 759A. Menendez testified that he personally measured it, and his testimony is credible. He testified that he had it analyzed and it contained 7% chrysotile asbestos, 35% cellulose, and 58% bitumen. The test results were expressly incorporated into Specification 01013 of the contract. The specificity of Menendez's tests and measurements contrast sharply with Appellant's failure to mention to any of the government representatives that its crew had discovered that the contract was allegedly flawed in this substantial and crucial detail.

The record contains no indication that Appellant ever suggested to the Contracting Officer that the contract specifications identifying and requiring abatement of the flashing on Building 759A were in error because the building lacked a flashing. Appellant's representatives attended the site visit on October 28, and reported the government's concerns about the removal of ACM to Robert Lusa. The report of the site visit includes no reference that Appellant's crew advised the government's representatives that the building contained no flashing. The next day, October 29, 1999, Lusa wrote to the A/E that his crew removed gravel stop and, if that contained ACM, it was not identified in the contract. He failed to mention, as he would later contend, that the building contained no flashing. Nor did he advise the Contracting Officer that the building contained no flashing when he responded to the Cease and Desist Order.

Moreover, to the extent any confusion remained about the distinction between the fascia board and the flashing, or misunderstanding about nomenclature, it was clarified in the Contracting Officer's Show Cause Order issued on January 19, 2000,



which specifically cited the October 28, 1999, site visit observation that “perimeter roof flashing with ACM” was removed from Building 759A. Appellant responded to the order, but never mentioned that the building had no flashing to remove.

Under these circumstances, we believe an experienced roofing contractor would not likely overlook the significance of a discovery by its work crew that a building lacked a roofing component which an owner specifically identified as present and was the subject of numerous contract specifications which the contractor was accused of violating. We believe Appellant would have come forward long before the hearing and advised the Contracting Officer that Building 759A had no flashing if that were the roof condition its crew had actually encountered. Robert Lusa’s testimony in this regard is not only internally conflicted, but otherwise lacking in credibility.

The Contracting Officer’s representatives who personally examined the flashing before the work commenced, observed that flashing had been removed, and saw ACM waste in the dumpsters. In the absence of credible evidence to the contrary, we conclude that Lusa & Sons commenced ACM removal without required permits or asbestos submittal approvals. The Cease and Desist Order, therefore, properly directed it to cease further abatement operations, and accordingly, the delay it caused on this job does not excuse the default. *See, Joell Construction Co.*, ASBCA, 88-2 BCA ¶ 20, 733.

### **Termination**

On February 7, 2000, the Contracting Officer terminated Lusa & Sons for default pursuant to FAR ¶ 52,249-10(a) for allegedly failing to perform the project in a timely and responsible manner and violating the Cease and Desist Order regarding the handling and removal of ACM without the required permits and approved submittals. The Termination Notice was issued about five months after Appellant was scheduled to initiate asbestos abatement activities (September 6, 1999) and nearly two months after the Substantial Completion date (December 13, 1999). The Contracting Officer determined that the Contractor had failed to produce an acceptable asbestos abatement submittal or appropriate EQB permits, and concluded that the problems would not be rectified.

Appellant argues that the grounds cited in the termination notice are without

merit. It contends that the government refused to approve permits issued by EQB, refused to approve asbestos submittals, and improperly directed Appellant to bag materials subsequently determined not to be ACM, re-handle existing waste, duplicate efforts, and then refused to acknowledge additional time and money arising from costs associated with these improper directions. In addition, Appellant asserts that the Contracting Officer lost independence and impartiality when he simply confirmed the incorrect determinations of fact by his consultants and failed to consider the impact of contracting actions by his representatives which bordered on bad faith and irresponsible conduct. Appellant further accuses the Contracting Officer of failing to assess of all the relevant circumstances when he exercised his discretion under the Default clause, and further asserts that substantial completion date should have been extended until April 19, 2000, based upon delays caused by the Contracting Officer. In summary, Appellant argues that the termination was an arbitrary and capricious abuse of discretion which justifies the conversion of the default termination into a termination for convenience.

The record shows that the Project Manager Donegan conducted a site visit on December 8, 1999, along with D’Narvarte and Menendez, and together they determined that Lusa & Sons had violated the Cease and Desist Order by removing approximately 25 percent of the roofing layers on Building 702 without approved submittals or permits. The Site Visit Report did not mention a distinction between the gravel and tar comprising the upper portion of the roof on Building 702, and the bottom layer of felt and mastic which constituted the ACM requiring abatement at the Recreation Building 702; however, Donegan testified that she relied upon Menendez who advised her that asbestos submittals were required for the work which had been done. The report also noted the presence of asbestos containing material in “areas along the perimeter” of the building 759A which “... cannot be removed until all submittals, codes and regulations are followed.”

Menendez returned to the site on January 2, 2000. Although Appellant was, by then, well aware that it was to leave the ACM alone until its submittals were approved, Menendez observed Bruce Lusa bagging ACM without proper protective gear, and Donegan, following another site visit on January 13, 2000, observed ACM in an open dumpster near Building 759A and reported that additional ACM abatement work had taken place on Building 702. Concerned about these observations and findings of his consultants, the Contracting Officer issued a Show Cause Notice on January 18, 2000.

Considerable time was devoted at the hearing to exploring the disagreement between the parties regarding the roof condition on Buildings 702 and the contents of a dumpster near Building 759A. Menendez, Donegan, and D'Navarte testified that an open dumpster contained ACM near building 759A and that an under layer of felt and mastic containing ACM on Building 702 had been removed. They observed striations on the roof slab and the presence of a grinding machine which led them to conclude that felt and mastic had been removed by grinding rather than manual methods, and they took pictures of the roof areas they had physically investigated. Those pictures were subsequently reviewed by Dushayne.

According to Dushayne, many of these pictures revealed only that gravel ballast, not felt, was spudded off manually using hand tools such as spudbars, scappers blades, and a hand axe, not a grinding machine. He believed the striations marks were consistent with the use of hand tools. Smooth, lighter areas of the roof surface which Menendez identified as areas where felt and mastic were removed were interpreted by Dushayne as showing nothing more than a reflection of the sun. He acknowledged, however, that he had not physically examined the roofs.

In assessing the evidence addressing the conditions on the roofs of both buildings, we have accorded greater weight to the testimony Menendez, D'Navarte, and Donegan than the contrary testimony of Dushayne, Truett, and Robert Lusa. Unlike the three witnesses called by Appellant, none of whom personally observed the changing conditions on the roofs over time, D'Navarte, Donegan, and especially Menendez were eye witnesses to the conditions of both roofs before any work commenced, while work was in progress, and after the Cease and Desist Order issued. The photographs documented their personal observations.

Thus, Menendez, in particular, physically observed the smooth, light roof surface that may have appeared to Dushayne as a mere reflection of the sun in the photo, but Menendez, who observed the roof itself and was familiar with its original condition, identified the smooth spot as an area where patches ACM felt or mastic had been removed. As a result, even if we accepted the notion that the photos, alone, were inconclusive, Menendez's credible personal observations that abatement work had taken place would be entitled to greater evidentiary weight than contrary opinions based upon ambiguous photos. Menendez further observed Bruce Lusa bagging ACM without protective equipment, and this observation was essentially unrefuted by any direct evidence. Indeed, for reasons this record fails to reflect, Appellant called neither its on-site superintendent, Bruce Lusa, nor any

member of the crew who physically worked on the roof of Building 759A or Building 702 to testify at the hearing. Consequently, the only eyewitness accounts of the changes in the roof conditions on either building were provided by Menendez, D'Navarte, and Donegan.

Robert Lusa vigorously denied the charge that Appellant removed ACM in violation of the Cease and Desist Order, but we are constrained to conclude that his testimony is singularly unreliable. He testified, variously, that 20% to 25% of the flashing was missing from Building 759A, that Building 759A had no flashing at all, that the edge condition on Building 759A which, by nomenclature, might be considered flashing contained no ACM, that his crew removed no ACM from Building 759A prior to the Cease and Desist Order, and removed no ACM from that building thereafter, that no ACM was removed from Building 702 at any time, and that waste material in the dumpsters contained no ACM. Despite these denials, however, Dushayne, saw indications that some abatement work had taken place, and Robert Lusa's hearing testimony to the contrary contradicted his own contemporaneously authored documents. In answering the Show Cause Order issued on January 18, 2000, Robert Lusa represented, for example, that the work on the roof Building 702 was performed before the Cease and Desist Order issued on November 17, 1999, and "No additional asbestos was removed after" that date. And later, on January 28, 2000, Lusa wrote to request "authorization to repack the ACM in the Dumpster." These documents indicate that asbestos work was performed by Appellant's crew notwithstanding Robert Lusa's testimony to the contrary.

Appellant also argued that the debris in the dumpster including the gravel stop was asbestos free, and that this was, "most telling concerning the factual circumstances surrounding issuance of the Cease and Desist Order and the ultimate termination...." The Board has reviewed the record evidence Appellant relies upon to support its notion that Menendez's conclusion that the dumpsters contained ACM "...ultimately proved to be false." The evidence consists of two documents prepared by Menendez on February 24, 2000, following a meeting with representatives of BFI and Lusa & Sons regarding the removal and disposal of the contents of the dumpsters. The reports note that Lusa representatives denied any knowledge of ACM in the dumpsters, which Menendez described as a "misrepresentation." BFI, in contrast, considered it likely that the site was no longer visible because several days of dumping probably buried it under tons of household garbage, rendering an "investigation" unlikely to confirm ACM disposal.

Consequently, although the “gravel tested non-ACM,” Menendez noted that he personally observed Bruce Lusa working at the dumpsters and packaging ACM. Since BFI had not actually inspected the dump site, the fact that three days of over-dumping would have complicated any effort to investigate the site is not sufficient to support a finding that Menendez’s testimony, based upon his direct observations, are not credible. To the contrary, his testimony is corroborated by Robert Lusa’s express request in writing for authorization to re-package the waste ACM, and Dushayne’s testimony that he “saw indications” of ACM removal including felt from Building 702.

The record thus confirms that Robert Lusa knew the dumpster contained ACM and he knew his crew had removed asbestos, although for purposes of responding to the Show Cause Notice he was only willing to concede that the work pre-dated the Cease and Desist Notice. We understand that his assertion to the Contracting officer was an attempt to refute the charge that the work on Building 702 violated the Cease and Desist Order because it pre-dated it, but it succeeded in demonstrating the lack veracity in his testimony and representations about when the ACM was abated and his complete lack of credibility in testimony denying that his crew removed any ACM on this job.

In view of our conclusion that a demolition permit and approved asbestos submittals were required before Appellant was authorized to engage in any ACM abatement work, the method of removal, whether manually or by grinding, is inconsequential. Any abatement work was a violation of the Cease and Desist Order and the contract, and the record shows that asbestos work did indeed take place both before and after the Cease and Desist Order issued.

### **Submittals Filed After the December 13, 1999 Substantial Completion Date**

Appellant provided asbestos submittals under Specification 02086 on December 16, 1999, January 3, 2000, and January 13, 2000. All were found deficient by Menendez on grounds that they failed to comply with contract specifications and included EQB permits for removal of a volume of ACM which was not adequate to cover the amount of waste generated on this job as estimated

by Dushayne and Menendez. Appellant charges that Menendez's action was unwarranted and predicated upon unspecified ulterior motives. While Appellant was in default when it failed to make the crucial asbestos submittals prior to the substantial completion date, *See, Good Construction, Co.*, ASBCA, 86-2 BCA ¶ 18,912, the Board otherwise concludes that Menendez had good and sufficient reasons for declining to approve Appellant's asbestos submittals on their merits when Appellant finally did submit them.

Guided by the Submittal Checklist in Specification 01301, Menendez determined, that Appellant's submittals could not be approved. The deficiencies he noted, included, *inter alia*, the lack of location and layout of asbestos control areas, lack of asbestos work sequencing, absence of EQB permits, worker certifications, and waste licenses and forms. In response, Lusa & Sons forwarded revised asbestos submittals referencing Specification 02086. Its response consisted of two separate submittals - one, dated January 3, 2000, included an operations permit issued by EQB on December 13, 2000. The second submittal was dated December 30, 1999, and included a second EQB permit dated December 22, 1999. On January 13, 2000, Appellant provided its submittal revisions. None of these submittals was approved and with good reason.

The deficiencies he noted followed a Submittal Checklist included as a part of Specification Section 01301, and included, *inter alia*, the lack of location and layout of asbestos control areas, lack of asbestos work sequencing, and invalid worker certifications and waste licenses and forms. Menendez also noted that Appellant's January 13, 2000, submittal revision not only failed to cure many of the deficiencies he had noted in Appellant's December 30 submittals, but included a work plan for removal of only 5 cubic yards of ACM from both buildings, and contained no identification or the removal method for the ACM on Building 702.

In addition to the deficiencies in the submittals, the record confirms that Appellant obtained an EQB permit for the removal of 20 cubic yards of ACM, a volume which was substantially less than the amount of ACM waste material generated on this job. Menendez, for example, calculated that approximately 80 cubic yards of ACM waste could be expected, while Dushayne estimated ACM waste at 92.5 cubic yards. In contrast, the permit documents do not disclose the assumptions upon which the 20 cubic yard estimate was predicated. Menendez, however, concluded that Appellant underestimated the amount of ACM in its

application to EQB, and Dushayne confirmed the fact that the permit did reflect an understatement of the ACM waste generated by this project.

As a consequence, we conclude on this record that Appellant obtained a permit for a volume of ACM which was not adequate to accommodate the needs of the job. Under these circumstances, we find ample support in the record to support Menendez's conclusion that both the asbestos submittals and EQB permits were inadequate. Consequently, Appellant had failed to produce satisfactory submittals by January 19, 2000, when the Contracting Officer issued his Show Cause Notice. Medical Necessities, Inc., VABCA 91-2 BCA ¶ 23,973.

### **Forbearance**

Nor do we find any merit in Appellant's suggestion that the Contracting Officer's review of its submittals after December 13, 1999, impliedly extended the substantial completion date or constituted a waiver of the right to declare Appellant in default. It is well settled that the failure to terminate immediately when the right to terminate accrues does not constitute a waiver. Pelliccia v. U.S., 208 Cl. Ct. 278 (1975). The Contracting Officer is entitled to a reasonable period to investigate the facts to determine how best to proceed in light of the government's needs and best interest. *See*, Eraklis Eraklidis, ASBCA, 91-3 BCA ¶ 24,188; H.N. Bailey & Assoc., v. U.S., 196 Cl. Ct. 156 (1971). In this instance, the Contracting Officer exercised his authority to terminate for default 56 days after the Substantial Completion date. We find the period of investigation, though lengthy, reasonable nevertheless.

Although Appellant was in default on December 13, 1999, and subject to immediate termination, the Contracting Officer investigated whether the default was excusable, and Menendez, D'Narvarte, and Donegan continued to explore the possibility that Lusa & Sons might be able to produce acceptable submittals

and proceed with the work in the government's best interest. The Contracting Officer thus investigated whether it was in the government's best interest to elect to allow the Contractor to continue performance. *See*, Fairfield Scientific Corp., ASBCA, 78-1 BCA ¶ 12,869. The result of his inquiry, however, confirmed Appellant's inability to perform in a timely and responsible manner. *See*, Dangfeng Shen Ho v. U.S., 49 Fed. Cl. 96, 105 (2001). Its twice revised asbestos submittals

remained unacceptable, even as its crew continued to violate the Cease and Desist Order as post-default site investigations revealed. Indeed, the site inspection on January 13, 2000, revealed that ACM still was not properly contained, and Dushayne viewed the photographic evidence which essentially confirmed that observation.

Nevertheless, rather than rely solely upon the views and findings of his consultants, the Contracting Officer invited Appellant's comments. On January 19, 2000, he issued a Show Cause Notice which advised Appellant that the government was considering termination and afforded Appellant an opportunity to respond. Five days later, Appellant denied that any asbestos work was performed after the Cease and Desist order issued and blamed the lack of progress on delays it attributed to the Contracting Officer.

Appellant's answer was accorded due consideration. Menendez met with Lusa & Sons' representatives on January 28, 2000, and submitted a written analysis of Appellant's response to the Project Manager, which recounted, in detail, his personal observations of asbestos-related work activities after the Cease and Desist Order issued and which continued as late as January 17, 2000. The Contracting Officer reviewed the results of the investigation before concluding that Lusa & Sons was unable to perform the project in a timely and responsible manner and had violated the Cease and Desist Order by performing abatement work without approved submittals and required permits. Based upon these considerations, he terminated the contract on February 7, 2000, fourteen days after the Show Cause Notice issued. *Compare, Prestex, Inc.*, ASBCA, 81-1 BCA ¶ 14,882, *recon. denied*, 81-2 BCA ¶ 15,397. Considering the scope, depth, and complexity of the investigation into Appellant's default and the government's needs, we conclude that the period of forbearance was reasonable, and that waiver of the right to terminate has not been established. *DeVito v. U.S.*, 413 F.2d 1147 (Cl. Ct. 1969).

Appellant's inadequate, incomplete, and untimely responses provided no grounds for excusing the default. *See, Medical Necessities, Inc.*, VABCA, 91-2 BCA ¶ 23,973; *T.A. Industries, Inc.*, VABCA, 90-3 BCA ¶ 22,967. Without approval of the asbestos submittals, the RJCC project could never be completed. The inability to remove the ACM was a driving delay on the entire project. Under these circumstances, Appellant's expressed intention to correct deficiencies and promises to cure its inadequate submittals subsequent to the Substantial Completion date, *Micro-Metric*, GSBCA, 97-1 BCA ¶ 28,645, and the Contracting Officer's



forbearance were not enough to excuse the default. DeVito v. U.S., *supra*.

### **FAR Factors**

Appellant contends that the Contracting Officer abused his discretion and failed to consider all of the relevant circumstances before issuing the termination notice. We disagree. Consideration of the FAR factors may aid us in determining whether the Contracting Officer abused his discretion, but they “are not prerequisite to a valid termination for default.” DCX, Inc., v. Perry, 79 F.3d 132 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 992 (1996); Laumann Manufacturing Corp., ASBCA, 2001-2 BCA ¶ 31,517; Imperial, Inc., 2001-1 BCA ¶ 31,382. The Contracting Officer’s consideration of the factors is merely one element considered in evaluating the totality of the circumstances involved in the situation. Michigan Joint Sealing, Inc., ASBCA, 933 BCA ¶ 26,011. The question is whether, considering the totality of the circumstances, the Contracting Officer’s discretion was exercised reasonably.

The record shows that the substantial completion date passed with substantial asbestos abatement work still unfinished, and the Contractor was making no progress. Equally significant, what asbestos abatement work the Contractor had performed was undertaken in breach of contract requirements and in violation of a Cease and Desist Order which implicated issues of public health and safety. Terminations for default have been sustained where contractors have failed to follow instructions in circumstances far less compelling than a flagrant violation of a properly focused health and safety-related cease and desist order. *See*, Arthur Napier, PSBCA, 94-2 BCA ¶ 26,695; Environmental Data Consultants, Inc., GSBCA, 96-2 BCA ¶ 28,614.

Nor do we find merit in Appellant’s assertion that the Contracting Officer failed to exercise independent judgment impartially, and improperly deferred to findings and conclusions recommended by his staff or consultants. The Contracting Officer must be free, especially in technical areas, to rely upon the advice of his staff and other personnel which, in his judgment, is necessary for proper and efficient administration of the contract. Skip Kirchdorfer, Inc., ASBCA, 91-1 BCA ¶ 23,380; AFV Enterprises, Inc., PSBCA, 2001-1 BCA ¶ 31,388; Nuclear Research Corp. v. U.S., 814 F.2d 647 (Fed. Cir. 1987). As noted above, however, the Contracting Officer may not rely solely upon the representations of his consultants. He notified Appellant that he was considering a default termination and invited

Appellant's response to the circumstances which he thought might justify such drastic action. Contrary to Appellant's assertions, the record shows that the Contracting Officer affirmatively solicited its input and acted only after Appellant filed its comments. Furthermore, the information he relied upon was fully adjudicated in this proceeding, and the record before us confirms that it was, in aspects here pertinent, accurate, credible, and sufficient to support the default termination he imposed. Accordingly, we find no merit in Appellant's assertion that the Contracting Officer acted improperly or abused his discretion in this matter.

### **Liquidated Damages**

In his brief on appeal to the Board, the Contracting Officer's counsel argued that the government is entitled to liquidated damages due to Appellant's inexcusable delays in contract performance. According to the brief, liquidated damages should be calculated from December 13, 1999, (154 days from date of notice to proceed) to the time when final completion was, in fact, achieved. Reasoning further, the brief alleges that the Contracting Officer determined that the period required for re-procurement of a roofing contractor and the time-value of the percentage of work completed effectively offset each other. Therefore, 154 days (the contractually-mandated period for attaining substantial completion), the brief advises, should be added to the 56 days by which Lusa & Sons had already exceeded the substantial completion date when the contractor was terminated for default on February 7, 2000. The resulting liquidated damages for a period of 210 days (ending July 11, 2000), under the contractual formula of \$570 a day would allegedly total liquidated damages in the amount of \$119,700 to which, the brief contends, the government is entitled. Appeal Brief at 34-35.

Appellant objects to the belated "claim" for liquidated damages asserted for the first time in the Contracting Officer's Post-Hearing Brief to the Board. Prior to that, Appellant notes without contradiction, the Contracting Officer failed to raise the issue in any decision he issued. As a consequence, Appellant argues that the effort to impose liquidated damages through comments in a brief to the Board is contrary to the Contract Disputes Act of 1978, and deprives it of an opportunity to review, comment upon, and appeal from a properly rendered decision of the Contracting Officer. We agree.

The manner in which the government seeks to impose liquidated damages in this proceeding is incompatible with the requirements of the Contract Disputes Act

and notions of procedural due process. The Contracting Officer correctly perceives that such damages are available in default situations, but the Board has been unable to locate in the appeal record any formal decision or any document of any type that might be deemed to be a decision of the Contracting Officer which assesses the damages claimed in the brief. Furthermore, in his reply to the Contractor's appeal, the Contracting Officer failed to address the Appellant's contentions and objections to the imposition of liquidated damages.

Now, liquidated damages are not imposed *per se*, and the specific amount of damages a Contracting Officer seeks to impose may raise factual issues which may be disputed by the contractor. A contractor may, for example, show that the amount sought is an unenforceable penalty, Priebe & Sons, Inc., v. U.S., 332 U.S. 407 (1947); JEM Development Corp., ASABCA, 94-1 BCA ¶ 26,407, or that the re-procurement contractor experienced delays for which the Appellant contractor should not be liable, Mega Construction, Co., v. U.S., 29 Fed Cl. 346 (1993), or that the amount demanded simply misapplied the Liquidated Damages clause. A contractor is entitled to fair notice that these issues may be in play.

The Board is mindful of a situation in which a liquidated damages assessment was upheld notwithstanding the fact that the assessment was included in a government performance appraisal form for the contract rather than formally assessed in a decision of the Contracting Officer. *See, Eurostyle, Inc., GSBCA*, 91-1 BCA ¶ 23595. Whether or not this sort of notification in a performance appraisal constitutes a proper liquidated damage claim assessment decision, see, 41 U.S.C. § 605(a), we note that it was imposed in the same month the appeal was filed and, at least, afforded the contractor in Eurostyle an opportunity to challenge the factual predicates of the assessment on appeal. In contrast, the Contracting Officer here merely "reserved all rights and remedies," under the contract, but apparently rendered no decision in any form assessing liquidated damages while the dispute was pending before him.

While the failure of the Contracting Officer to render a written final decision assessing liquidated damages may deprive the Board of jurisdiction to grant the request, the manner in which liquidated damage issues were inserted into this appeal constitutes prejudicial surprise and would otherwise persuade us to stay our hand even if we were empowered to act. For these reasons, the Board concludes that it

cannot sustain the liquidated damages sought in the Contracting Officer's appeal brief. Liquidated damages are, therefore, denied.

### **Prompt Payment Act**

Although we have concluded that Lusa & Sons was properly terminated for default, it is nevertheless entitled to payment for work properly performed before the default termination. *See, J.B. Enters, Inc.*, ASBCA, 83-2 BCA ¶ 16,808. Thus, the government, on November 3, 1999, received Appellant's First Payment request in the amount of \$159,480.00 for the materials delivered to the RJCC work site and associated mobilizations costs. The Department of Labor, Division of National Program Support, on December 27, 1999, recommended payment in the full amount of the invoice; however, payment was not forthcoming until "sometime after the termination" on February 7, 2000. (*See*, Appellant's proposed finding 63; Tr. 780). Under these circumstances, Appellant invoked the Prompt Payment Act, 31 U.S.C. §§ 3901-3906, in its complaint filed July 11, 2000, and demanded the interest penalties authorized by the Act and the implementing regulations promulgated and published by the Office of Management and Budget. 5 C.F.R §§ 1315, et. seq.

Under applicable regulations, when payment is made after the due date, which in this instance was December 2, 1999, interest is paid "automatically..." 5 C.F.R. § 1315.4(i), regardless of whether the vendor requested payment of the interest penalty. *See*, Section 1315.10(b)(2). These self-executing penalty provisions are, however, subject to the caveats set forth in Section 1315(c)(1). Thus, Prompt Payment Act interest penalties are not due when payment is delayed, "because of a dispute ... over the amount of the payment or other issues concerning compliance with the contract." In this instance, there appears to be no dispute about the materials delivered or the amount of the invoice; however, a significant dispute clearly existed over "other issues concerning compliance with the terms of the contract."

Four days after the invoice was received, the Contracting Officer issued a Cease and Desist Order on the grounds that the Contractor was abating asbestos without required submittals and permits. That Order was in effect when payment on the invoice was recommended on December 27, 1999. By then, not only was the contract beyond the substantial completion date with the job about 45% complete,

but the asbestos submittals had still not been approved. Indeed, subsequent to the payment recommendation, the Contracting Officer, with reason to believe that the Contractor had violated the Cease and Desist Order, issued a Show Cause Notice, and, subsequently, issued the default termination.

Under these circumstances, we look not to the automatic interest penalty provisions. If payment on Appellant's invoice was delayed because of the dispute over its compliance with the asbestos abatement specifications of the contract, interest penalties may not be due. *See*, Section 1315.10(c)(1). Although the record does not specifically explain why payment was delayed and then paid in full after the termination, the dispute concerning these "other compliance issues" and non-payment of the interest penalty, gave rise, it would seem, to a separate claim under Section 6 of the Contract Disputes Act. 5 C.F.R §1315.16(a) of the regulations. The record, however, does not indicate that Appellant filed a claim for interest penalties with the Contracting Officer in compliance with the Contract Disputes Act and the regulations implementing the Prompt Payment Act. Accordingly, Appellant's request for an interest penalty is denied.

For all of the foregoing reasons, therefore:

#### ORDER

IT IS ORDERED that the appeal filed in this matter by R.F. Lusa & Sons Sheetmetal, Inc., be, and it hereby is, denied.

A

Stuart A. Levin,  
Judge, LBCA

Concur:

John M. Vittone,  
Chairman, LBCA

Edward Terhune Miller,  
Judge, LBCA